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**EVALUATING THE INFLUENCE OF EU COMPETITION
RULES AND ISLAMIC PRINCIPLES ON THE
TREATMENT OF ABUSE OF DOMINANCE UNDER
EGYPTIAN COMPETITION LAW**

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**THESIS SUBMITTED FOR THE DEGREE OF DOCTOR
OF PHILOSOPHY**

**SUSSEX LAW SCHOOL
UNIVERSITY OF SUSSEX**

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DECLARATION

I hereby declare that this thesis has not been submitted, either in the same or different form, to this or any other University for a degree.

Mourad F. K. Greiss, November 2011

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Table of Contents

TABLE OF CASES	VIII
TABLE OF TREATIES, LEGISLATIONS AND POLICY DOCUMENTS	XIV
ABBREVIATIONS	XVIII
SUMMARY	XX
GENERAL INTRODUCTION.....	2
1. THE DEVELOPMENT OF COMPETITION LAW IN EGYPT AND THE EURO-MEDITERRANEAN PARTNERSHIP.....	12
1.1 INTRODUCTION	12
1.2 HISTORICAL BACKGROUND OF THE EU/EGYPT TRADE RELATIONS	13
1.3 THE RATIONALE BEHIND THE ENTRENCHMENT OF COMPETITION RULES IN TRADE AGREEMENTS: PRESSURES ON EGYPT TO ENACT COMPETITION LAW.....	16
1.4 COMPETITION PROVISIONS OF THE EURO-MEDITERRANEAN ASSOCIATION AGREEMENT WITH EGYPT	21
1.4.1 Appraisal of the competition provisions.....	21
1.4.2 Invocation of the competition provisions	25
1.4.2.1 Direct effect in the EU	26
1.4.2.2 Direct effect in Egypt.....	29
1.5 CONCLUSION	31
2. THE COMPARATIVE LAW METHODS IN CONTEXT IN RELATION TO THE STUDY ON EU AND EGYPTIAN COMPETITION LAWS.....	34
2.1 INTRODUCTION	34
2.2 COMPARATIVE LAW: HISTORICAL BACKGROUND, METHODS AND PRECEPTS AND THEIR RELEVANCE	35
2.2.1 Historical background of comparative law in Europe.....	35
2.2.2 Identification of the legal systems under scrutiny – Can a comparative study take place between entirely different systems?	38
2.2.3 The subject of the comparative study: An investigation of similarities or differences?.....	40
2.2.4 Contextualizing the importance and relevance of functionalism.....	43
2.2.5 The rules of legal translations and their relevance	46
2.3 THE EGYPTIAN LEGAL SYSTEM – AN INFLUENCE OF FRENCH LAW, ISLAMIC LAW OR IS IT A MIXED SYSTEM?.....	47
2.3.1 An overview of the history of the Egyptian Legal System: The rising influence of Islamic and French Laws	47
2.3.2 Islamic Law v. French Law – The Case of Egypt	48

2.3.3 The concept of mixed legal systems in context	51
2.4 RECEPTIONS, HARMONIZATION AND TRANSPLANTATION OF LAWS: THE CASE OF THE EU AND EGYPT IN CONTEXT	53
2.4.1 Evolution of the concept of harmonization.....	53
2.4.2 Do Legal borrowing and legal transplants really exist?	54
2.4.3 Arguments countering transplants and receptions	56
2.4.4 The rationale behind receptions and transplants	57
2.4.5 The receptivity of foreign law in Egypt: Comparing the past with the future	58
2.5 CONCLUSION	61
3. THE SIMILARITIES AND DIFFERENCES OF THE ORIGINS AND VALUES OF EU AND EGYPTIAN COMPETITION LAWS.....	64
3.1 INTRODUCTION	64
3.2 THE ORIGINS AND VALUES OF EU COMPETITION LAW.....	65
3.2.1 Historical background of the evolution of the Freiburg and Austrian Schools: The road to Ordoliberalism and social market economy	65
3.2.2 Objectives of the Ordoliberal framework	68
3.2.3 Understanding the function of economic constitution and competition law within the Ordoliberal framework	69
3.2.4 The influential role of Ordoliberals in Europe.....	73
3.2.5 Conceptualizing European and Egyptian rule of reason	78
3.2.6 Arguments for and against rule of reason and effects-based approaches to Competition Law	88
3.2.7 Economic expertise in the EU Commission: A departure from the Ordoliberal theory of market intervention?	92
3.3 THE ORIGINS AND VALUES OF EGYPTIAN COMPETITION LAW	97
3.3.1 The sources of Islamic Law	98
3.3.2 The objectives of Islamic Law (“ <i>Maqasid Al-Shari’ah</i> ”)	99
3.3.3 The conception of monopoly under Islamic Law	100
3.3.4 Market intervention/price control under Islamic Law	104
3.3.5 The evolution of economic expertise in Egypt.....	108
3.4 INVESTIGATING THE SIMILARITIES AND DIFFERENCES OF THE ORIGINS AND VALUES OF EU AND EGYPTIAN COMPETITION LAWS	111
3.5 CONCLUSION	116
4. THE INFLUENCE OF EU AND ISLAMIC LAWS ON THE TREATMENT OF ABUSE OF DOMINANCE UNDER EGYPTIAN COMPEITION LAW: INVESTIGATING DISTINCTIVE CHARACTERISTICS IN EGYPTIAN RULES.....	118
4.1 INTRODUCTION	118
4.2 CONCEPTUALIZING DOMINANCE UNDER EU AND EGYPTIAN COMPETITION LAWS	119
4.2.1 The concept of dominance: definition and rationale for legality	119

4.2.1.1 Dominance under EU Competition Law	119
4.2.1.2 Dominance under Egyptian Competition Law	123
4.2.2 The determinants of dominance	126
4.2.2.1 Determining dominance under EU Competition Law	126
4.2.2.2 Determining dominance under Egyptian Competition Law	131
4.3 REGULATING THE ABUSE OF EXCESSIVE PRICING	135
4.3.1 The practice of excessive pricing: Definition and arguments for and against prohibition	135
4.3.2 The recognition of excessive pricing under EU Competition Law: An investigation priority?.....	139
4.3.3 The lack of excessive pricing prohibition under Egyptian Competition Law.....	142
4.3.3.1 The legality of high pricing in general under Egyptian Competition Law	142
4.3.3.2 Investigating the Islamicity of the practice of excessive pricing	145
4.4 THE ABUSE OF MARGIN SQUEEZE.....	146
4.4.1The practice of margin squeeze: Definition and comparison with excessive pricing	146
4.4.2 The legal treatment of margin squeeze under EU Competition Law	148
4.4.3 The legal treatment of margin squeeze under Egyptian Competition Law	151
4.4.4 Investigating the Islamicity of the treatment of margin squeeze under Egyptian Competition Law	154
4.5 THE METHOD FOR ANALYSIS OF ABUSE OF DOMINANCE UNDER EU AND EGYPTIAN COMPETITION LAWS.....	157
4.5.1 Modernizing Article 102 TFEU	157
4.5.2 Articles 8 and 13 of the Law No. 3/2005 and Executive Regulations: A space for an effects-based approach?	165
4.6 CONCLUSION	169
5. EVALUATING POTENTIAL EFFECTS IN THE ECONOMY: METHODS FOR TACKLING GAPS IN THE TREATMENT OF ABUSE OF DOMINANCE UNDER EGYPTIAN COMPETITION LAW.....	174
5.1 INTRODUCTION	174
5.2 INVESTIGATING POTENTIAL EFFECTS ON THE EGYPTIAN ECONOMY	175
5.2.1 Potential effects that may arise from the lack of excessive pricing prohibition	176
5.2.2 Does the lack of comprehensive prohibition of margin squeeze pose potential effects to the Egyptian economy?.....	183
5.2.3 Potential effects that may arise from employing an effects-based approach to abuse of dominance	186
5.3 METHODS TO TACKLE THE GAPS IN EGYPTIAN COMPETITION LAW: AN ACTIVIST APPROACH?	189

5.4 CAPACITY BUILDING, TECHNICAL ASSISTANCE AND COOPERATION AS MEANS FOR THE OPTIMAL IMPLEMENTATION OF EGYPTIAN COMPETITION LAW.....	201
5.5 CONCLUSION	205
GENERAL CONCLUSION	209
BIBLIOGRAPHY.....	215
ANNEXES	

TABLE OF CASES

EU CASES

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Euro-Mediterranean Agreement Establishing an Association Between the European Community and their Member States, of the one part, and the Arab Republic of Egypt, on the other part, (2004)

ABBREVIATIONS

AG	Advocate-General
BER	Block Exemption Regulation
CAC	South African Competition Appeal Court
CCE	Chief Competition Economist of the European Commission
CDU	Christian Democratic Union
CoJ	Court of Justice of the European Union
CUP	Cambridge University Press
DG Comp	Directorate-General for Competition in the European Commission
EAGCP	The Economic Advisory Group for Competition Policy
EC	European Community
ECA	Egyptian Competition Authority
EEC	European Economic Community
EMAA	Euro-Mediterranean Association Agreement with Egypt
ENP	European Neighbourhood Policy
EU	European Union
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
GC	General Court of the European Union
GWB	German Law against Restraints on Competition (<i>Gesetz gegen Wettbewerbsbeschränkungen</i>)
ICN	International Competition Network

IMF	International Monetary Fund
ITO	International Trade Organization
OECD	Organization for Economic Cooperation and Development
OJ	Official Journal of the European Union
OUP	Oxford University Press
RTAs	Regional Trade Agreements
SACA	South African Competition Act
S-C-P	Structure-Conduct-Performance Paradigm
SME	Social Market Economy
SSNIP	Small but Significant Non-transitory Increase in Price Test
TFEU	Treaty on the Functioning of the European Union (Treaty of Lisbon)
UfM	Union for Mediterranean
UNCTAD	United Nations Conference on Trade and Development
US	United States
WTO	World Trade Organization

UNIVERSITY OF SUSSEX

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DOCTOR OF PHILOSOPHY

**EVALUATING THE INFLUENCE OF EU COMPETITION RULES AND
ISLAMIC PRINCIPLES ON THE TREATMENT OF ABUSE OF
DOMINANCE UNDER EGYPTIAN COMPETITION LAW**

SUMMARY

Egypt faced three central pressures to introduce its own competition law in 2005: first, EU/Egypt trade relations, second, introduction of the 1991 privatisation programme and third, its long-term desire by virtue of its Constitution to follow Islamic principles that condemn monopoly. However, Egypt was not forced to transplant EU rules as a result of EU/Egypt trade relations, although it is implicit that the EU deems it *desirable* to do so. By employing the functional method of comparative law for the purposes of the study on EU, Islamic, and Egyptian laws, the central argument of this thesis is that the Egyptian treatment of abuse of dominance is distinctive in three ways. First, Egyptian rules do not prohibit the practice of excessive pricing. Although in jurisdictions that prohibit it, most notably the EU system, competition authorities do not contemplate it as an investigation priority, it is argued that the lack of its prohibition raises Islamic law concerns and may lead to potential effects on the Egyptian economy. However, the difficulties which investigators face in settling such practice (as the South African *Mittal* case demonstrates) suggest that the Egyptian legislator may have adopted the *right* approach not to prohibit it; otherwise, this may have increased the likelihood of committing type II errors and, as a result, violate Islamic law principles of *injustice*. Second, in contrast with EU law, Egyptian rules do not cover the practice of below-cost margin squeeze. Although it is argued that its omission does not pose potential effects to the economy, it is suggested that it raises Islamic law concerns on the basis of fairness and intentions principles. Given that it is relatively easier to investigate, compared to excessive pricing, it is suggested that the Egyptian legislator should re-consider encompassing it in the future while drawing on the approach adopted in EU law. Third, the Egyptian Competition Law reflects the EU Commission's initiative of employing an effects-based approach to abuse of dominance. However, the Egyptian system, arguably influenced by the Islamic principles on market intervention, goes a little further to require an *actual* effects standard. Despite an effects-based analysis being difficult to employ in emerging economies with inadequate economic expertise like Egypt, it is argued in its favour for two reasons. First, it increases the chances of avoiding type II errors, which, similar to excessive pricing and margin squeeze, violate Islamic law and; second, the Egyptian Competition Authority's analysis in the *Steel* study shows that it is capable of employing this approach at this stage. For the purposes of re-considering the foregoing (gaps) in the future, the Egyptian Competition Authority should focus on increasing economic expertise and seek technical assistance from competition authorities of the developed world.

GENERAL INTRODUCTION

GENERAL INTRODUCTION

Market power and cartels were given attention as early as ancient times. Particularly the perils of monopoly may be traced in ancient Greece and the Bible. Later, in 1776, Adam Smith published his renowned book: ‘The Wealth of Nations’. In it, he stated that: “People of the same trade seldom meet, even for merriment and diversion, but the conversation ends in a conspiracy against the public or some contrivance to raise prices”. Smith thus cautioned the society about the threats of monopoly on welfare¹. Paradoxically, however, the emergence of competition law in modern history was not rapid and did not happen overnight. It rather took a gradual stance; starting from the adoption of such law in developed countries and then moving to developing countries.

It all started when Americans expressed their fears about the adoption of trusts by firms during the 19th Century. Particularly, the concern derived from the trend that prevailed at the time whereby American firms acquired stocks from other competing firms and transformed them into trusts in a manner that controlled the transactions of these competing firms in aspects such as pricing, volume of output, etc. with the intention to eventually monopolize the market in question. These concerns eventually materialized with the enactment of the Sherman Act in 1890. The Act prohibited agreements that restrained trade as well as monopolistic practices².

Furthermore, the increasing use of economic power and cartels during the Second World War on the international level in general and Europe in particular led governments to consider the enactment of antitrust laws to combat these practices³. Particularly, in Europe, this led to the emergence of a group of intellectuals of the Freiburg School (in addition to some members of the Austrian School) to develop some initiatives in pursuit of market reform (what was then known as Ordoliberal thought). In fact, it was these initiatives that arguably formed competition provisions of the Treaty of Rome in 1957; Articles 85 and 86 of the Treaty establishing the European Economic

¹ See Peeperkorn, L. & Verouden, V. (2007) “The Economics of Competition” *The EC Law on Competition*, 2nd Edition. Faull & Nikpay (Eds.) OUP, p.6, citing Adam Smith.

² Dhall, V. (2007) “Overview – Key concepts of Competition Law” *Competition Law Today – Concepts, Issues, and the Law in Practice*, Dhall (Eds.), OUP, pp.1-2.

³ The terms ‘antitrust law’ and ‘competition law’ shall be used interchangeably throughout this thesis.

Community ('EEC') [now Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU')]⁴. These provisions prohibit agreements restrictive of competition and abuse of dominance.

The interface between trade and competition is immense. The relationship evolved more than half a Century ago and, precisely, since the conclusion of the Second World War. It was widely perceived that trade relations that were unaccompanied by competition rules may result in considerably detrimental consequences to the nations involved. This is because trade liberalisation solely removes public barriers (quotas, custom duties etc.). Private barriers (abuse of dominance, cartels, etc.), on the other hand, given the chance of their occurrence in any trade relationship, and thereby leading to trade distortion, are merely regulated by competition laws⁵.

Consequently, trade agreements that were concluded throughout the past two decades – regional or bilateral agreements – included competition rules. In fact, the entrenchment of competition rules in trade agreements arguably became a tool used by developed countries to encourage their developing partners to enact their own competition laws; otherwise the former's laws may be applicable in the event of disputes. However, the enactment of competition law in developing countries⁶ is subject to substantial debate. While some argue that developing countries should adopt their own national competition laws, others suggest that there is no need for such law. For instance, it is often argued that introducing competition law in developing countries may help reduce

⁴ For literature that argues in favour of positive Ordoliberal influence on the drafting of Articles 85 and 86 EEC, see Gerber, D. J. (1994) "Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe" (42), *American Journal of Comparative Law*, American Society of Comparative Law. For a converse view, see Akman, P. and Kassim, H. (2010) "Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy" 48(1), *Journal of Common Market Studies*, Blackwell Publishing Ltd.

Note that these contrasting views shall be discussed in detail in chapter three of the present thesis.

⁵ Geradin, D. & Petit, N. (2003) "*Competition Rules in the Euromed Countries with a special emphasis on Network Industries*" Paper presented at the World Bank ABCDE Conference, Paris, 15th -16th May, 2003, available from: (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=489691), accessed 18-01-2008; Geradin, D. (2004) "*Competition Law and Regional Economic Integration- An Analysis of the Southern Mediterranean Countries*" World Bank Policy Research Working Paper No. 35, Washington D.C.: World Bank.

⁶ The terms 'developing countries' and 'emerging economies' shall be used interchangeably throughout the thesis.

the high concentration levels that inherently prevail in these nations and that are likely to lead to anti-competitive practices⁷.

Competition law is, moreover, seen as a tool for attracting foreign direct investment ('FDI')⁸ in developing countries. Particularly, foreign investors may be induced to invest in countries that have a sound competition culture, and since many developing nations lack this characteristic, competition law is seen as a tool that may help tackle this issue. Competition law is also perceived a mechanism for combating poverty in developing countries in the sense that it helps keep prices as low as possible and as such enables the poor to have access to resources. On the other hand, arguments countering competition law for developing countries seem to focus on the idea that such law will hardly play any role since the decision-making of competition authorities is not independent, but is rather subject to the scrutiny of the government. Thus, decisions of competition authorities may be highly influenced by interested political parties⁹.

Negotiations pertaining to the adoption of Egyptian Competition Law and Regulation commenced in the mid-1990s. Following several drafts and debates in the parliament, the Egyptian Competition Law and Regulation were introduced in 2005. Given that such law and the Euro-Mediterranean Association Agreement with Egypt ('EMAA') were being negotiated during the same period, it is sometimes argued that the EU posed some pressure on Egypt to accelerate the introduction of its law. However, one should not attribute the adoption of such law solely to the external pressures posed by the EU.

The Egyptian government encountered a couple more pressures that are deemed internal. First, the Egyptian Constitution stipulates that Islamic law¹⁰ constitutes the main source of legislation in Egypt. Monopoly is explicitly condemned under Islamic

⁷ Dabbah, M. M. (2010) "*International and Comparative Competition Law*" First Edition, CUP, pp.297-298

⁸ FDI may be defined as: "Ownership and (normally) control of a business or part of a business in another country". It is also renowned as a "driver" for economic development. For an expansive discussion on FDI, see Trebilcock, M. J. & Howse, R. (2005) "*The Regulation of International Trade*" Third Edition, Routledge, London and New York, pp.439; Evenett, S. J. (2003) "Links between Development and Competition Law in Developing Countries" available from: (www.alexandria.unisg.ch/EXPORT/DL/22249.pdf) accessed 07-05-2010, p.7.

⁹ See Dabbah, M. M. (2010) "*International and Comparative Competition Law*" First Edition, CUP, pp.298-304

¹⁰ The terms 'Islamic law' and '*Shari'ah*' shall be used interchangeably throughout the thesis.

law. However, there is no direct evidence that the relevant authorities are obliged to follow the *Shari'ah* principles within the framework of the Egyptian Legal System. Nevertheless it is argued that the wording of the Egyptian Constitution implies the desire to do so. Second, and even more rigid than the former, the privatisation programme that was introduced in Egypt in 1991, which transferred monopoly from the state to the private sector also contributed to the necessity to carry out legal reform by the government.

The central aim of this thesis is to investigate the influences of EU Competition Law and Islamic principles on the treatment of abuse of dominance under Egyptian Competition Law; through which the study will explore the distinctive characteristics in this treatment. These (gaps) are likely to have potential effects in the economy and may concurrently raise Islamic law concerns and, as such, may call for future reform. The question is what sort of reform? Are legal transplants the solution? It is perceived that this investigation may be best conducted by determining the similarities and differences between the EU rules, Islamic principles, and the relevant Egyptian rules on abuse of dominance. This will be carried out by employing the functional method of comparative law, aside from the thematic method, which recognizes that the comparativist should not merely investigate the similarities and differences of respective laws in theory, but should more importantly go deeper to explore how they function in practice. Given the relative lack of case law under the Egyptian system, the gaps will be explored by drawing on the relevant EU practice and, in some respects, South African practice (as a comparable emerging economy).

Unlike EU Competition Law, the Egyptian and Islamic rules on competition have been dealt with only on very few occasions and from a very generic perspective. Particularly, most of the studies carried out tended to look at aspects such as the Egyptian law itself, how it may be implemented, and how it may help Egypt adapt to the 1991 privatisation reform, etc. Indeed this is not surprising since the law has been recently adopted and the volume of (published) guidelines and case law until today is relatively limited. Similarly, Islamic law studies carried out so far merely focussed on the economy in general and hardly make any reference to antitrust in particular. However, this may be explained by the fact that competition law is a relatively new field in the Middle Eastern

and North African regions. In fact, there are hardly any studies that investigate the influences of EU law and Islamic principles on Egyptian Competition Law with reference to the Euro-Mediterranean Partnership. Studies that were carried out in this respect merely focussed on the EMAA in generic terms; all of which adds to and combines with the importance of this thesis.

However, this thesis will not cover *agreements restrictive of competition* (be it horizontal or vertical agreements)¹¹. This is because it is argued that the relevant Egyptian rules addressing them are appropriate as they stand. Particularly, the Egyptian legislator seems to have imposed a *per se* prohibition to horizontal agreements. This means that investigating authorities shall not conduct a study of the agreement's effects. Although it is argued in favour of an effects-based approach in relation to abuse of dominance¹² in chapter five, this argument does not extend to anticompetitive horizontal agreements (e.g. dividing markets, price fixing, etc.)¹³, since they are arguably less likely to generate pro-competitive benefits in Egypt than abuse of dominance practices. That said, it is perceived that a *per se* approach may be the favourable legal treatment.

With regards to vertical agreements, the Egyptian legislator requires a rule of reason approach¹⁴. Although this may in itself raise concerns that closely correlate with the approach in relation to the method of appraisal of abuse of dominance, given that this

¹¹ Horizontal agreements are agreements between market players who operate at the same level of competition (e.g. agreement between two or more competitors). Vertical agreements, on the other hand, are agreements between market players at different levels of competition (e.g. agreement between producer and supplier).

¹² Although employing an effects-based approach to abuse of dominance was seen as a peculiarity in Egyptian Competition Law that may have an effect in the economy, given that such approach may be difficult to employ at the early stages of implementation, it is concluded that employing such approach does not pose any potential risk to the economy on the basis that such approach helps avoid type II errors (falsely condemning pro-competitive practices) and that the Egyptian Competition Authority has so far deployed it in a competent manner.

¹³ See Report of the Egyptian Competition Authority "*Study on the Cement Market in the Arab Republic of Egypt in light of the Law on Protection of Competition and Prohibition of Monopolistic Practices*" Study by virtue of the Minister of Trade and Industry's request dated 16th July, 2006 [Report in Arabic], published on the website on 5th September, 2008, available from: (<http://www.eca.org.eg/ECA/Publication/List.aspx?CategoryID=1>) accessed 01-10-2009; Judgement of the Egyptian Court of First Instance on Misdemeanours Nasr City (2900/2008) August 25, 2008. Note that this Judgment was upheld on appeal; making it the first case to be finalized under Egyptian Competition Law with positive findings until current. See appeal in *East Cairo* (22622/2008)

¹⁴ Rule of reason is understood as an approach that balances pro and anti-competitive effects and determines which form of effects outweighs the other. This approach will be discussed in detail in chapter three.

approach is arguably difficult to implement for newly established competition authorities like the Egyptian one, it is suggested that disputes involving anti-competitive vertical agreements may on some occasions bring benefits to consumers. Take for instance resale price maintenance. A practice as such may be beneficial to consumers where the manufacturer sets a maximum resale price for his supplier in the sense that consumers may benefit from low prices. Moreover, the Egyptian Competition Authority's ('ECA') studies it conducted so far may suggest that it is capable of competently employing such test. For that reason, this thesis will only discuss the treatment of abuse of dominance.

The thesis does not, furthermore, extend to the investigative procedure of Egyptian Competition Law. This is because the accessible (published) case law does not seem to go into detail in relation to how, for instance, the competition authority gathered its documentation, how it intends to carry out inspections, etc. Hence, it is perceived that encompassing the investigative procedure in the thesis, at this stage, may represent no more than a reiteration of what legal provisions stipulate; along with some speculation over how they could be construed. Therefore, the thesis only goes as far as the method of assessment is concerned¹⁵.

The thesis is formed of five chapters. The first chapter elucidates the historical background of the EU/Egypt trade relations and delineates the development of competition law and regulation in Egypt and the pressures which the Egyptian government had encountered thereto. It finds that the Egyptian government did not only encounter the external pressure posed by the EMAA in relation to the introduction of its own competition law, but also the internal pressure that followed the 1991 structural reform. Not least, it explores the Egyptian government's long-term desire to comply with the *Shari'ah* principles as set out in the Constitution as a further indispensable yet arguably less rigid internal pressure. It also provides interpretations to the wording of the EMAA and determines whether or not Egypt was obliged to transplant EU

¹⁵ For a detailed interpretation of the enforcement procedure, see Greiss, M. (2010) "Investigative powers of the Egyptian Competition Authority: A guide for companies in the Egyptian market" 31(11), *European Competition Law Review*, Sweet & Maxwell, pp.459-465, available from: (<http://eprints.sussex.ac.uk/2482/>) accessed 2-12-2010

competition rules and determines when the EMAA's competition rules are applicable. Finally, it investigates whether or not the EMAA's competition rules are directly effective before national authorities/courts.

The second chapter identifies the comparative law methods that will be employed in the comparative study of EU, Egyptian and Islamic rules on monopoly. It determines the comparability of the systems under consideration and identifies the EMAA as the common denominator for the comparative study. It moreover contemplates the functional method as an indispensable tool for conducting the present study, since it does not merely focus on legal rules in theory, but also extends to envisage how they function comparably in practice. The chapter furthermore investigates the parameters for which one may decide whether transplantation may or may not be successful in the borrowing state.

The third chapter investigates the similarities and differences of the origins and values of EU and Egyptian Competition Laws using the functional methods discussed in chapter two. It particularly investigates the influence of Ordoliberalism on the drafting process of EU Competition Law. The role of competition before and after the entry into force of the Treaty of Lisbon (TFEU) is also compared. It is argued that EU Commission is moving towards an effects-based approach – a movement that (arguably) contradicts with the Ordoliberal theories that favour minimal market intervention. Moreover, it is suggested that employing an effects-based analysis may help avoid type II errors (falsely condemning pro-competitive practices).

The chapter also importantly foregrounds the constitutional parameters within which Egyptian Competition Law may operate. This is primarily based on the *Shari'ah* principles on market intervention – this is premised on the arguable desire of the Egyptian government to comply with these principles. It is concluded that Ordoliberalism and *Shari'ah* overlap in aspects such as fairness and degree of influence on the drafting of competition law. However, they relatively vary in relation to the existing constitutional underpinnings. While the EU Commission and Courts are not obliged to follow Ordoliberal theories while implementing competition law, the ECA and Courts, on the other hand, while they are not constitutionally obliged to follow

Shari'ah principles, there exists a desire from the Egyptian government to comply with them.

The fourth chapter, employing the functional method, determines the influence of EU and Islamic laws on the treatment of abuse of dominance under Egyptian Competition Laws and, on which basis, explores the distinctive features in the latter system. It particularly finds the lack of prohibition of both excessive pricing and downstream below-cost pricing margin squeeze, and the employment of an effects-based approach to abuse of dominant in general at this stage as distinctive characteristics that may have potential effects in the economy. It also argues that the former two (gaps) raise Islamic law concerns, while employing an effects-based approach reflects the EU Commission's initiative to follow this approach. However, the Egyptian approach, arguably influenced by the *Shari'ah* principles of market intervention, goes a little further to require an *actual* effects standard.

The fifth and final chapter evaluates the potential effects of these gaps in the Egyptian economy. Arguing in favour of the Harvard School's structure-conduct-performance paradigm, it finds that the high concentration levels that still prevail in Egypt as a result of the 1991 structural reform may increase the likelihood of success of excessive pricing that, as a result, may directly harm consumers and hinder the economy through an inefficient allocation of resources. Although the lack of prohibition of the practice raises Islamic law concerns, and given the difficulties in investigating it (as the South African *Mittal* case suggests), it is argued that the Egyptian system should not opt for such reform at this stage. Apart from these difficulties, it is argued, from a *Shari'ah* point of view that employing it may, on the contrary, lead to type II errors that are certainly not desired on the basis of *injustice*.

Moreover, the chapter argues that the lack of prohibition of below-cost (downstream) price squeeze may pose limited effects in the economy. However, given that such practice raises Islamic law concerns and, unlike excessive pricing, it involves relatively less complex analysis, it is perceived that the Egyptian legislator should opt for legal reform in a manner that closely correlates to the EU's treatment of margin squeeze in general. It is also concluded that although the deployment of effects-based approach

may generate potential effects in the economy at this early stage of competition law implementation, it is suggested that the ECA and Courts should stick by it on the basis that it helps avoid type II errors and that the ECA had employed it competently in the *Steel* case. For the purposes of tackling these gaps, however, it is argued that Egypt should increase the level of economic expertise in competition law through seeking technical assistance from competition authorities of the developed world.

CHAPTER 1

THE DEVELOPMENT OF COMPETITION LAW IN EGYPT AND THE EURO-MEDITERRANEAN PARTNERSHIP

CHAPTER 1

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1.1 INTRODUCTION

The interface between trade and competition is inevitable. It is widely perceived that trade agreements that are free from any competition rules may generate formidable consequences for parties involved, since trade agreements tend to merely enshrine public barriers to trade. Domestic competition laws, on the other hand, only tackle private barriers. Thus, the past two decades experienced an inclination towards the entrenchment of competition rules in trade agreements; particularly those between developed and developing countries.

Following such trend, the EU concluded the EMAA in 2004. It is believed that the negotiation process formed part of the pressure on the Egyptian government to adopt its own competition law. However, Egypt encountered two further internal pressures. This chapter aims to highlight the historical background underlying the relationship between Egypt and the EU and the link between it and the enactment of Egyptian Competition Law and to provide an interpretation to the EMAA's competition rules and discern whether or not these rules may be invoked before EU and Egyptian Courts.

The chapter is divided into three parts. The first part will provide chronology of the EU/Egypt trade relations. The second part will identify the rationale behind the inclusion of competition rules in trade agreements in the first place and underline the pressures that the Egyptian government encountered in relation to the adoption of Egyptian Competition Law and Regulation. The final part will provide an appraisal of the relevant competition provisions of the EMAA and discern whether or not they may be invoked before national courts.

1.2 HISTORICAL BACKGROUND OF THE EU/EGYPT TRADE RELATIONS

The EU/Egypt trade relations initially emerged in 1977 when the EU signed the General Cooperation Agreement with Egypt. Specifically, such agreement provided a preferential trade relationship that prevailed until 1996. It, moreover, provided non-reciprocal free market access for industrial Egyptian exports (with the exception of textiles and clothing) to the EU market¹⁶. The agreement did not, however, include a section on competition rules¹⁷. It was not until the Barcelona Conference that convened in 1995 when negotiations of the association agreement commenced. The negotiations lasted approximately four and a half years and a further two years for both parties to sign the agreement in 2001 followed by another three years for ratification by the EU and Egyptian Parliaments¹⁸.

But what is an association agreement within the framework of EU law? Does it by any means resemble cooperation agreements that maybe concluded on a unilateral basis i.e. non-reciprocally such as the aforementioned one with Egypt in 1977? One would have expected Article 217 TFEU [ex. Article 310 of the Treaty Establishing the European Community ('EC')] to have clarified the meaning of an 'association agreement' but in fact, it has not. It solely entitled the EU to enter into such agreements by stipulating: "The Union may conclude with one or more member third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure"¹⁹.

The Court of Justice of the EU ('CoJ') in *Meryem Demirel v. Stadt Schwabisch Gmund*, however, provided a more precise definition. According to the CoJ: "Association

¹⁶ Holmes, P., Ghoneim, A., Gasiorsek, M. and El-Garf, M. (2008) "Chapter one – EU/Egypt ENP as a form of deep integration" *Examining the Deep Integration aspects of the EU-South Mediterranean Countries: Comparing the Barcelona Process and Neighbourhood Policy, the Case of Egypt*, FEMISE Project No FEM31-08, available from: (<http://www.femise.org/PDF/ci2006/FEM31-08.pdf>) accessed 22-08-2009, pp.1-30

¹⁷ At this particular stage, only a few number of agreements contained competition provisions in a manner that simply promotes fair competition practices. See for example, the Association Agreement between the European Economic Community [now EU] and Cyprus, 19th December, 1972, O.J. L133/2, 21st May, 1973.

¹⁸ More specifically, ratification by the European Parliament on 29th November, 2001 and on 7th April, 2003 by the Egyptian Parliament.

¹⁹ Article 217, Treaty on the Functioning of the European Union, [2007], O.J. C.306/01

agreement creat[es] *special, privileged links* with a non-member country which must, at least to a certain extent, take part in the [Union] system”²⁰. The definition unequivocally indicates that association agreements imply a return from all its parties and not unilaterally from the EU, as was the case with respect to the 1977 Cooperation Agreement.

The objective behind the Barcelona Process was mainly to adopt a free trade area between the EU and its Mediterranean neighbours by the beginning of 2010. Most of the EU’s neighbouring countries, including Egypt, were involved in the negotiations²¹. Following a series of intensive negotiations, the EU agreed to adopt the Euro-Mediterranean Association Agreement with each of its Mediterranean neighbouring countries on a bilateral basis²². The EMAA was signed and came into force in July 2004. Egypt was given a five-year provisional period for implementation of some of its obligations, including competition provisions; at the time Egypt was yet to enact a competition law. It is somewhat implicit from provisions of the EMAA that drafters have feared the latter (as will be discussed later on in part 1.4.1 of this chapter). Recognizing that it is a mechanism that may deepen the EU/Egypt trade relations, the EU also adopted the so-called European Neighbourhood Policy (‘ENP’) following preliminary discussions that took place in 2003²³.

The ENP is a mechanism enabling the governance of the EU’s trading partners - Eastern European and the Southern Mediterranean region including Egypt²⁴. The ENP was accompanied by an action plan for each Mediterranean partner. According to the EU Commission’s communication to the Council and Parliament regarding the

²⁰ Case 12/86, *Meryem Demirel v. Stadt Schwabisch Gmund* [1987] E.C.R. 3719

²¹ Negotiations also involved countries like Algeria, Israel, Jordan, Palestine, Lebanon, Morocco, Syria and Tunisia.

²² Montanari, M. (2007) “The Barcelona Process and the Political Economy of Euro-Mediterranean Trade Integration” 45(5), *Journal of Common Market Studies*, pp.1011-1040

²³ See EU Commission (2004) “European Neighbourhood Policy, Strategy Paper”, Brussels 5th December 2004 COM 2004 373 Final

²⁴ Apart from Egypt, other ENP countries are Algeria, Armenia, Azerbaijan, Belarus, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestinian Authority, Syria, Ukraine and Tunisia. It is worthy to note that Ukraine is the only country that does not name the ENP Action Plan as such. The Ukrainian Government rather names it as ‘Enhanced Agreement’. For more detail, see Hillion, C. (2007) “Mapping-out the new Contractual Relations between the European Union and its Neighbours: Learning from the EU Ukraine ‘Enhanced Agreement’” (12), *European Foreign Affairs Review*, Kluwer Law International BV, pp.169-182

strengthening of ENP, actions plans are set as a tool for enhancing and deepening trade relations²⁵. Following several negotiations and drafts, the action plan with Egypt was signed and came into force in March 2007. Whilst objectives of the ENP were rightly described as elusive and uncertain by many, an implied objective, according to Hoekman, is that it is perceived as a driving force for deepening trade and economic integration; specifically with the South Mediterranean region²⁶. To elaborate more on the objectives of the ENP, the EU Commission, in its communication to the European Council and Parliament in 2006 stated that: “A key premise of the ENP was that economic integration should go beyond free trade in goods and services to also include “behind the border” issues: addressing non-tariff barriers and progressively achieving comprehensive convergence in trade and regulatory areas (such as [...] competition policy [...] research cooperation [...])”²⁷.

The Communication clearly reflects the Commission’s emphasis on both competition policy and cooperation²⁸. One should, in turn, expect a detailed section that explains the working of the ENP and its action plan, as an arguably considerable extension to the EMAA, with regards to competition and cooperation along with some guidelines for their application within the context of the EMAA²⁹. The question that should thus be raised in this respect: What did the ENP and its action plan add to the EMAA? This is obviously given the fact that the Egyptian government had indicated in its action plan that economic reform was one of its future priorities.

²⁵ European Commission (2006) “Communication from the Commission to the Council and the European Parliament on Strengthening the European Neighbourhood Policy”, Brussels, 4 December 2006 COM(2006)726 final

It is worth noting that the ENP’s action plan is not a legally binding agreement as is the case with the Association Agreement itself.

²⁶ Hoekman, B. (2005) “*From Euro-Med partnership to European Neighbourhood: Deeper Integration a la Carte and Economic Development*” ECES Working Paper No. 103, Cairo: Egyptian Centre for Economic Studies.

²⁷ European Commission (2006) “Communication from the Commission to the Council and the European Parliament on Strengthening the European Neighbourhood Policy”, Brussels, 4 December 2006 COM(2006)726 final, 4

²⁸ Although it will be argued that the European Mediterranean Partnership in general (so far) did not provide sufficient competition cooperation mechanisms, it is suggested that the EU Commission has shown, on some occasions in practice, its intention to cooperate with its trading partners’ competition authorities. This issue, along with capacity building and technical assistance as arguably imperative methods for the proper implementation of Egyptian Competition Law will feature in part 5.4 (chapter five).

²⁹ The ENP and association agreements in general, complement to each other. The ENP’s action plan is perceived as an operational plan for association agreements. See Holmes et.al (2008), op.cit

The weakness of the ENP throughout its implementation (2005-2006) led the Commission to consider taking further action towards strengthening it. In 2006, the Commission adopted a proposal named ENP-plus where it prioritized economic reform that encompassed competition policy among some other issues³⁰. A further but more recent development was the adoption of the Union for Mediterranean ('UfM'). French President Sarkozy initially proposed the UfM in 2007. Sarkozy perceived that the initiative could hasten the Barcelona Process; aside from attempting to bring the Israeli-Palestinian conflict to an end. Following several meetings, the EU endorsed Sarkozy's initiative and adopted the UfM during the Paris Summit on 13th July 2008³¹.

In fact, the UfM emerged after a wide recognition of the underlying weaknesses of the Barcelona Process as it stands. That said; the objective of the UfM is to further strengthen the Barcelona Process and help achieve its goals. According to the EU Commission, the UfM may help accelerate the Barcelona Process in three ways. First, by maintaining the institutional imbalance between the EU and its Mediterranean partners; second, improving the "co-ownership" of the region's multilateral relations³²; and third, increasing transparency among the region's citizens that this initiative shall competently resolve their day-to-day problems. However, it may still be too soon to judge upon the success of the UfM in general and, in particular, in relation to the EU cooperation on competition matters with Egypt³³.

1.3 THE RATIONALE BEHIND THE ENTRENCHMENT OF COMPETITION RULES IN TRADE AGREEMENTS: PRESSURES ON EGYPT TO ENACT COMPETITION LAW

Ever since the Second World War, numerous endeavours have been made to enact international antitrust rules through trade negotiations. Antitrust rules were considered

³⁰ European Commission (2006) "Communication from the Commission to the Council and the European Parliament on Strengthening the European Neighbourhood Policy", Brussels, 4 December 2006 COM(2006)726 final

³¹ Ghoneim, A. (2009) "From EU Association Agreements to EU Neighbourhood Policy and Union for the Mediterranean: Does Egypt Need This Change in EU Regional Trade Policy?" *The European Neighbourhood Policy and the Southern Mediterranean*, Comelli, M. Erlap, A. and Ustin, C. (Eds.), Ankara: Middle East Technical University Press, p.94

³² This is particularly through adopting a system of "co-presidencies" (formed of one from each side) and appointing a Secretariat as well as a Joint Permanent Committee.

³³ See EU Commission (2009) "Union for Mediterranean" Brussels, 10th July, 2009, MEMO/09/333

by 1947 in the Havana Charter and International Trade Organization ('ITO'). This was through a chapter that stipulated the relevant restrictive practices. However, the ITO soon collapsed due to refusal from the U.S. government and no agreement was reached on antitrust rules. The General Agreement on Tariffs and Trade ('GATT'), which followed the ITO, in turn, did not contemplate such rules³⁴.

The intensive World Trade Organisation ('WTO') discussions on the relationship between trade and competition did not take place until the mid-1990s. At that stage, trade agreements (whether on the regional or bilateral level) gradually started taking a different stance - one that included competition provisions³⁵. That said, during the 1970s when EEC/Egypt trade relations initially emerged, competition provisions were not perceived as a "must include" in the 1977 EEC/Egypt Cooperation Agreement. In fact, throughout the WTO discussions on the interface between trade and competition, the EU perceived that the inclusion of its competition rules in trade agreements might play a significant role in its future WTO negotiation position with respect to competition rules. This was particularly the case in relation to regional trade agreements ('RTAs'); whereas a number of countries are subject to the same competition rules³⁶.

The post-1995 era featured a trend on the adoption of bilateral trade agreements between developed and developing countries. Among these were the Europe Agreements concluded by the EU with Central and Eastern European countries (candidate countries) and Association Agreements with Mediterranean Countries (including the EMAA) – agreements with non-candidate countries. A common characteristic of these agreements was that they included competition rules that correspond to EU rules. In this sense, the EMAA, in contrast with the EEC/Egypt 1977 Cooperation Agreement, demonstrates a modern theme of how far competition rules should be given attention in trade agreements³⁷.

³⁴ Geradin, D. (2009) "*The Perils of Antitrust Proliferation – The Process "Decentralized Globalization" of Antitrust and the Risks of Over-Regulation of Competitive Behavior*" available from (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1327688) accessed 28-04-2010, p.4

³⁵ Geradin, D. and Petit, N. (2003) "Competition Policy and the Euro-Mediterranean Partnership" (8) *European Foreign Affairs Review*. pp.153-180

³⁶ Ibid.

³⁷ Holmes, P., Papadopoulos, A., Kayali, B. O. and Sydorak, A. (2005) "Trade and competition in RTAs: A missed opportunity" *Competition provisions in regional trade agreements: How to assure development*

In fact, there exists somehow a relationship between the EMAA and the introduction of competition law in Egypt. Ever since negotiations of the EMAA - the Barcelona Process –commenced in 1995, Egypt had opted to introduce its own competition law. The question that should be raised in this respect: Is this relationship a causative one? In other words, did Egypt enact its own competition law solely to satisfy the EU’s pre-requisites – or otherwise evade application of EU competition rules?

Truth be said, the Egyptian government did not only face the external pressures posed by the EMAA³⁸, but was also face with some internal pressures. It encountered a religious pressure to adopt and implement competition law; given that Egypt is an Islamic Law country; and that monopoly is strictly condemned and prohibited under the Islamic *Shari’ah*³⁹. The need to adopt competition law is arguably supported by Article 2 of the Egyptian Constitution which stipulates that: “Islam is the religion of the State [...] and the principles of the Islamic *Shari’ah* are the major source of legislation”. However, such religious pressure is not a new one; but has existed since the 1971 Constitution that declared the principles of Islamic *Shari’ah* as “a” principal source of legislation⁴⁰. The position of these principles was further strengthened in 1980 to declare *Shari’ah* as the major source of legislation when the wording of “a” was replaced by “the” in Article 2 (as quoted above)⁴¹.

But what is the meaning of Article 2 of the Egyptian Constitution in this context? At first sight, Article 2 seems to have two meanings. First, it entails that the lack of a legal rule(s), which prohibits a practice that is originally condemned by *Shari’ah* may, in itself, raise constitutional concerns – such as the pressure mentioned above on Egypt to enact a competition law in general. Second, Article 2 may require that any existing legal rule(s) that is incompatible with *Shari’ah* may be declared as unconstitutional.

gains Brusick, P., Alvarez, A. M. and Cernat, L. (Eds.), United Nations (New York and Geneva) available from: (http://www.unctad.org/en/docs/ditccpl20051_en.pdf) p.66

³⁸ Apart from the external pressures that were posed by the EU through the EMAA, the Egyptian government encountered pressures from the Common Market for Southern and Eastern Africa (‘COMESA’) to which Egypt is a party. Competition provisions of the COMESA are to a large extent inspired by the EU rules on competition.

³⁹ The *Shari’ah* principles on monopoly will be discussed in detail in chapter three.

⁴⁰ Nonetheless, this was not the first time for *Shari’ah* to feature in the Egyptian Constitution. Article 149 of the 1923 Constitution contemplated “Islam” as “the religion of the state”. However, the position of *Shari’ah* was not strengthened until the 1971 and 1980 amendments.

⁴¹ Article 2, Constitution of the Arab Republic of Egypt amended according to the result of the plebiscite on the constitutional amendment that was conducted on May, 22nd 1980

Challenging the constitutionality of legal rules is carried out before the Supreme Constitutional Court, pursuant to Article 175 of the Egyptian Constitution⁴². This means that the constitutionality of competition rules may not be challenged before ordinary courts (economic courts for the purposes of this thesis)⁴³. Hence, if constitutionality is raised before these latter courts, they shall refer the suspected unconstitutional matter to the Supreme Constitutional Court and then settle the original subject matter.

Following the 1980 Constitution amendment, the Supreme Constitutional Court issued an interesting judgement. The concern was on Article 227 of Civil Law No. 131 of 1948 that entitles contracting parties to agree on the price of interest in return for delayed payments; which in itself violates *Shari'ah*. The Court held that although Article 227 as such violated Article 2 of the Constitution, it was still deemed constitutional. In its reasoning, the Court indicated that the law concerned was issued in 1948, while the commitment to Islamic law principles in Article 2 was explicitly recognized at a later stage (1980). It added that Article 227 was not amended ever since Law No. 131 of 1948 was issued and that Article 2 does not apply on a retroactive basis. In other words, Article 2 does not apply retroactively to laws and regulations that were issued prior the 1980 Constitution amendment⁴⁴.

Notwithstanding the explicit stipulation of Article 2 of Egypt's supreme law, the Constitution, as well as the aforementioned judgement concerning civil law, there exists no direct evidence of an obligation on the legislator, relevant enforcing authorities or courts to follow Islamic principles. Subsequently this means that challenging the constitutionality of an Egyptian rule (or the lack of a rule concerning an act that is prohibited under Islamic law) on the basis that it does not adhere to the *Shari'ah* principles may not be sufficiently premised, if at all existent in practice. However, it is argued that by virtue of Article 2 there exists somewhat a desire to reflect Islamic principles under the Egyptian Legal System. That said one might not consider Article 2 as a rigid pressure on the Egyptian government to enact competition law.

⁴² Ibid, Article 175

⁴³ Competition-related disputes in Egypt are now subject to the exclusive jurisdiction of economic courts, according to Article 4 of the Law establishing Economic Courts. This law came into force in October 2008. Note that this development will be discussed in more detail in chapter three.

⁴⁴ See Judgement of the Supreme Constitutional Court, Case No. 47 of Year 4 (Judicial), 21-12-1985.

In fact, an internal pressure of a much more rigorous nature and impact than that of Article 2 is the one that derived from the 1991 privatisation programme that transformed state monopoly (state-owned enterprises, control over economic activities, etc.) to private sector monopoly. Up until the early 1990s the Egyptian government, via its state-owned enterprises, had control over economic activities, exchange rates, subsidies and the imposition of export bans. It therefore had a monopoly and so competition law was thought to be of no use at the time. It was, hence, perceived that competition law was of no use at that time. However, this strategy led to various structural impediments in the market by the late 1980s; being nonetheless, overshadowed by a substantial rise in its external resources and capital inflows. While these available resources enabled the government to maximise its expenditure to a certain extent, they have been subject to a dramatic depression during the mid 1980s and hence, structural barriers became more and more patent. This has undoubtedly, given rise to the compelling need for a stabilization mechanism and economic reform⁴⁵.

In 1991, an economic reform and structural adjustment programme finally took place, which was led by the International Monetary Fund ('IMF') and assisted by the World Bank. The main aim of this programme, as stated by the IMF was to "create, over the medium term, a decentralized market based, outward-oriented economy where private sector activity will be encouraged by a free, competitive, and stable environment with autonomy from government intervention"⁴⁶. This strengthened privatisation programme has had its remarkable role in the substantial and rapid emergence of the private sector⁴⁷.

However, the Egyptian experience of the introduction of the privatisation agenda was challenging. This was primarily due to the fact that the regulatory structure that existed prior to privatisation (where the state had control over most domestic projects) was

⁴⁵ El-Dean, B. A. and Mohieldin, M. (2001) "*On the Formulation and Enforcement of Competition Law in Emerging Economies: the Case of Egypt*" Working Paper No.60, the Egyptian Centre for Economic Studies, available from: (<http://www.eces.org.eg/Downloads/ECESWP60.pdf>) accessed 26-01-2008

⁴⁶ International Monetary Fund, (1991) "*Arab Republic of Egypt-Recent Economic Developments*" as cited by El-Dean and Mohieldin (2001), *op.cit.*, pp.22-23

⁴⁷ In fact, it is argued that it is this structural reform, among some other reasons, that triggered the Egyptian market to become highly concentrated and, as a result, increase the likelihood of success of the practice excessive pricing in Egypt. This argument will be highlighted in part 5.2.1 (chapter five).

adopted and implemented solely to match that particular stage. In other words, the regulatory structure that existed during the state-monopoly era did not match the post-privatisation circumstances. Furthermore, the transfer of monopoly from the public to the private sector led to an increasing number of anti-competitive allegations unaccompanied by a detailed competition law⁴⁸.

In pursuit of satisfying these internal and external pressures, and following numerous drafts commencing from the mid-1990s, the Egyptian Parliament approved the Law No. 3 of 2005 promulgating the Law on Protection of Competition and Prohibition of Monopolistic Conducts ('Law No. 3/2005') on 15th February 2005⁴⁹. This was followed by the issuance and approval of the Prime Ministerial Decree No.1316 of 2005 issuing the Executive Regulations of Protection of Competition and Prohibition of Monopolistic Conducts Law No. 3 of 2005 ('Executive Regulations') on 16th August 2005⁵⁰.

1.4 COMPETITION PROVISIONS OF THE EURO-MEDITERRANEAN ASSOCIATION AGREEMENT WITH EGYPT

1.4.1 Appraisal of the competition provisions

Competition rules of the EMAA are addressed in '*Chapter 2 – Competition and other Economic Matters*' under '*Title II – Free Movement of Goods – General Principles*'. Drafters of the EMAA possibly intended to stress the relationship between free trade and competition rules; otherwise the latter would have rather been placed under a separate title. This is indeed, reflected in the EMAA's competition rules. Particularly,

⁴⁸ Ghoneim, A. F. (2002) "*Competition Law and Competition Policy: What does Egypt really need?*" Paper Submitted for the ERF 9th Annual Conference, available from: (<http://www.erf.org.eg/9th%20annual%20conf/9th%20PDF%20Background/Trade/T-B%20Ahmed%20Ghoneim.pdf>) accessed 23-01-2008

However, there were some existing laws addressing anti-competitive conducts, but in a very broad sense. For instance, Article 345 of the Egyptian Penal Code prohibits increase or decrease in prices that are aimed at attaining illegal benefits. The Egyptian Commercial Law prohibits conducts that provide unfair competition.

⁴⁹ See Official Gazette No. 6 (Bis) dated 15/02/2005. Note that Article 4 of the Law No.3/2005 provides that such law shall come into force after 3 months of its publication. This means that the Law No.3/2005 came into force on 15/05/2005.

⁵⁰ See Official Gazette No. 32 (Bis) dated 17/08/2005. Note that Article 2 of the Executive Regulations provides such that the Decree issuing these regulations shall come into force on the day following its publication. This means that the executive regulations came into force on 18/08/2005. Note that the Egyptian Competition Authority translated the provisions of Law No. 3/2005 and its Executive Regulations. See Annexes 1 and 2 incorporated at the end of this thesis for the fully translated versions.

abuse of dominance is addressed under Article 34(1); according to which: “The following are incompatible with the proper functioning of the Agreement, insofar as they may affect trade between the [Union] and Egypt: [...] (ii) Abuse by one or more undertakings of a dominant position in the territories of the [Union] or Egypt as a whole or in a substantial part thereof [...]”⁵¹.

At the outset, one may observe that an abusive practice that does not affect trade between the EU and Egypt may not be subject to Article 34(1) of the EMAA, but instead to either EU or Egyptian competition law, depending on the territory where the practice took place. Such pre-requisite is indeed not surprising; given that the core objective and rationale behind competition rules of the EMAA is to foster trade and not only to protect the competition process between the EU and Egypt. Hence, the effect on trade remains a turning point in any dispute within the context of the EMAA⁵².

Article 34(1), should not be read in isolation. It was rather accompanied by two Declarations. First, The Declaration made by the European [Union] on Article 34 which provides that: “The [Union] declares that, until the adoption by the Association Council of the implementing rules on fair competition referred to in Article 34 paragraph 2, in the context of the interpretation of Article 34 paragraph 1, it will assess any practice contrary to that Article on the basis of the criteria resulting from the rules contained in Articles [101, 102 and 107 of the Treaty on the functioning of the European Union] [...]”⁵³. And, second, The Joint Declaration made by Egypt and European [Union] on Article 34 which states that: “The parties recognise that Egypt is currently in the process of drafting its own competition law. This will provide the necessary conditions for agreeing on the implementation rules referred to in Article 34(2). While drafting its law,

⁵¹Article 34(1), Euro-Mediterranean Agreement Establishing an Association Between the European Community and their Member States, of the one part, and the Arab Republic of Egypt, on the other part, (2004)

⁵²The condition of the ‘effect on trade’ is not a new one for the EU. It is found elsewhere in the TFEU which requires that trade be affected between member states as a prerequisite for application of its competition rules. In this respect, it may be useful to see the Commission Notice – *Guidelines on the effect on trade concept contained in Articles [101 and 102 of the TFEU]* [2004] OJ C 101/07. It was also a condition found in the European Economic Area Agreement as well as RTAs where the EU is not a member of, such as the COMESA and the MERCOSUR that contain the same condition.

⁵³ Declaration made by the European Community on Article 34, Euro-Mediterranean Agreement Establishing an Association Between the European Community and its Member States, of the one part, and the Arab Republic of Egypt, on the other part, (2004)

Egypt will take into account the competition rules developed within the European Union [...]”⁵⁴.

These Declarations may be construed in two distinct ways. One reading may imply that EU competition rules were meant to apply in the event where Egypt did not introduce its own law and where trade between the EU and Egypt is hindered by the scope of Article 34(1). Indeed this in itself may have accelerated the process of introducing competition law in Egypt, due to a possible fear of the application of EU rules. Moreover, applying Article 102 TFEU and its relevant EU practice until the Association Council adopts the related implementation rules may have an inevitable influence on the shape of the latter.

A second interpretation to these Declarations is that - until the implementation rules of Article 34 are adopted and due to the non-existence of any alternative replacement rules (Egyptian competition rules) at the time of entry into force of the EMAA - the EU competition rules are to apply. As for the point of giving account to EU competition rules while drafting the Egyptian ones, it may have intended to signify that the Egyptian regime should be more or less in line or compatible with the EU system, at least to some extent, for the purposes of the EMAA.

In other words, it is sometimes argued that a *de facto* imposed harmonization with EU competition rules may be indirectly inferred from the EMAA. Not only may this be clear from the Declaration made by the EU on the application of the TFEU rules until adoption of the EMAA’s implementation ones, but also from the following statement in the Joint Declaration: “While drafting its law, *Egypt will take into account the competition rules developed within the European Union*”⁵⁵. A statement as such, if narrowly construed, it may imply that the Egyptian legislator should harmonize

⁵⁴ Ibid, Joint Declaration made by Egypt and European Community on Article 34

⁵⁵ Ghoneim, A., Greiss, M., Holmes, P. (2008) “Chapter four – Competition” *Examining the Deep Integration aspects of the EU-South Mediterranean Countries: Comparing the Barcelona Process and Neighbourhood Policy, the Case of Egypt*, FEMISE Project No FEM31-08, available from: (<http://www.femise.org/PDF/ci2006/FEM31-08.pdf>) accessed 22-08-2009, p.87; Joint Declaration on Article 34, Euro-Mediterranean Agreement Establishing an Association Between the European Community and its Member States, of the one part, and the Arab Republic of Egypt, on the other part, (2004)

Egyptian rules with EU ones. Mr Juan Riviere⁵⁶, one of the negotiators of the EMAA, however, disagrees with this second interpretation.

In an interview with Mr Riviere regarding competition provisions of the EMAA, he stated that: “Since I negotiated the competition chapter with Egypt I could confirm to you that our intention wasn’t to oblige to copy our laws but to encourage the implementation of competition policy. It is right to say that before having a national competition law our trade relations involving competition issues will be to assess under the [EU] articles because it was the only legal reference in force. In fact during the negotiation the Egyptian side was thinking in terms of trade relations with future new WTO (GATT) obligations, subsidies treatment to some agriculture products, etc.; and we had already come to the conclusion that was better for future trade relations that the other party has competition legislation in force at home that to only cover X% of trade relations by competition provisions in the Association Agreement. This is obvious since the key for our relations was that the European companies trading and investing in Egypt had comparable treatment conditions, as the Egyptian companies will benefit in the EU market. You will understand our approach because anticompetitive effects occurred in each party market and not in the middle of the Mediterranean”⁵⁷.

Given such intention during the negotiation process, one should more or less recognize that the Declarations were meant to act as a tool to pressure Egypt to adopt its own competition law. A further implied belief is that Egypt is not forced to harmonize its own competition law with that of the EU⁵⁸. Nevertheless, one may consider that it is *desirable* that Egyptian competition law be as compatible as possible with that of the EU. This is to provide *comparable treatment conditions* in Egypt for EU investors similar to those existing in the EU to Egyptian investors. This may signify that there

⁵⁶ Mr Juan Riviere currently acts as a Policy and Strategy Advisor for Directorate-General for Competition (DG Comp) in the EU Commission.

⁵⁷ Interview with Mr Juan Riviere by email (Juan.Riviere@ec.europa.eu) on 12-11-2009

⁵⁸ Evidence on the argument that Egypt was not obliged to model its own competition law with EU rules is, for instance, the fact that it did not prohibit the conduct of excessive pricing (as Article 102(a) TFEU does – although investigated only under very exceptional circumstances). Had Egypt regulated such practice, and given the substantial hurdles in investigating it (even in developed countries), this may have put EU investors in Egypt at risk of being falsely condemned of exercising such practice (these matters will be discussed in more detail in parts 5.2.1 and 5.3 – chapter five). Undoubtedly, this was not the desired aim of the EMAA’s drafters. Although, investigating the conduct of excessive pricing in the EU does not seem to be a priority (this matter in particular will be discussed in part 4.3.2 – chapter four).

should be at least as Mohieldin argues, a common denominator between the two laws⁵⁹. Pursuant to Article 34(2) of the EMAA however, Article 34(1) is not to be read exclusively, as it merely sets out the prohibition rules in a very general manner. The Association Council is yet to provide the necessary implementation rules that were initially expected within the five-year period that followed entry into force of the EMAA (i.e. until 1st June, 2009)⁶⁰.

1.4.2 Invocation of the competition provisions

This part aims to enquire as to whether or not the Association Council's decisions based on competition provisions of the EMAA may have a direct effect. This would enable individuals or companies to invoke them before national courts of Egypt or EU member states. As noted earlier, the Association Council has not yet put the implementation rules in place. It is commonly agreed that, prior to the adoption of implementation rules in any association agreement with the EU, competition provisions therein would not be in question with respect to any dispute within the scope of the agreement and that the EU rules may be the applicable ones⁶¹. Therefore, this question is as yet unanswered. One should distinguish between direct effect in the EU and that under the Egyptian system.

⁵⁹ Mohieldin, M. (2002) Contribution from Egypt submitted at Session I of the OECD Second meeting of the Global Forum on Competition held on 14-15 February, 2002.

In fact, it is this 'common denominator' element that makes the EU-Egyptian Competition Law comparative study both *useful* and *comparable*. This will be discussed in further detail in part 2.2.2 (chapter two).

⁶⁰ Article 34(2), Euro-Mediterranean Agreement Establishing an Association Between the European Community and its Member States, of the one part, and the Arab Republic of Egypt, on the other part, (2004)

The Association Council is the body that administers implementation of Association Agreements. In the EMAA context and pursuant to Article 75(1) thereof, it consists of members of both; the European Council and Commission, on the one hand and members of the Egyptian Government, on the other hand. The Association Council has the authority to adopt legally binding decisions that are usually taken on a unanimous basis, as per Article 76 of the EMAA.

It is worthy to note that the Europe Agreements, as opposed to Euro-Mediterranean ones, have a tighter schedule with respect to the adoption of competition implementation rules.

⁶¹ Geradin (2004), *op.cit.*, p.40

This view is intended to cover all association agreements concluded by the EU.

1.4.2.1 Direct effect in the EU

Direct effect in the EU may be defined, according to Prechal, as: “The obligation of a court or another authority to apply the relevant provisions of [EU] law [or international agreements], either as a norm which governs the case or as a standard for legal review”⁶². In order to approach the direct effect enquiry of EMAA’s provisions in the EU, one should, at the outset, question whether or not association agreements, in general, fit within the EU legal order. While generally these agreements have been adopted in accordance with the terms of Article 217 TFEU, it would not be surprising to consider them as part of the EU legal order. This is indeed supported by the case law.

In *R. and V. Haegeman v. Belgian State*, the CoJ considered the Association Agreement between the EU (then EEC) and Greece as part of the Union’s legal order. More specifically, the CoJ indicated that since the agreement was concluded in accordance with the terms of Articles 215 and 217 TFEU (then 228 and 238 EEC), it should be contemplated as an act of one of the Union’s institutions within the meaning of sub-paragraph (B) of the first paragraph of Article 267 TEU (then 177 EEC) and that as of its entry into force date, it would constitute an integral part of the Union⁶³.

However, the CoJ in *Meryem Demirel v. Stadt Schwabisch Gmund* provided that some conditions should be met for provisions of an international agreement to be directly effective. It indicated that provisions of the agreement should provide clarity, preciseness and unconditional obligation. Particularly, the CoJ held that since some of the provisions of the Association Agreement with Turkey were not adequately “precise” and “unconditional”, they were not subject to direct effect⁶⁴. The CoJ in *Sevince v. Staatssecretaris Van Justitie* later on confirmed this when it indicated that

⁶² Prechal, S. (2000) “Does direct effect still matter?” (37), *Common Market Law Review*, Kluwer Law International, Netherlands, p.1048, emphasis added

⁶³ Case 181/73, *R. and V. Haegeman v. Belgian State* [1974] E.C.R. 449

⁶⁴ Case 12/86, *Meryem Demirel v. Stadt Schwabisch Gmund* [1987] E.C.R. 3719, para.23

The CoJ in *Metalsa* added that one should give account to the agreement’s formulation, aim and nature while questioning as to whether or not it may be directly effective. See Case 312/91, *Metalsa Srl v. Italy* [1992] E.C.R. I-3751

decisions of the Association Council had direct effect since they, along with provisions of the agreement itself, were “clear, precise and unconditional”⁶⁵.

Nonetheless, in *Simutenkov*, which concerned the Partnership and Cooperation Agreement with Russia, the CoJ did not follow the *Demirel* criteria. The CoJ in that case upheld direct effect even though ‘recommendations’ by the Cooperation Council were yet to be put in place for implementation of the concerned non-discrimination principle. However, this may be explained, according to Jacobs, by the fact that these recommendations were not in themselves binding and, hence, the question of direct effect did not depend on whether or not they have been adopted⁶⁶.

Given that the criteria identified by the CoJ in *Demirel* remain central for the present inquiry - notwithstanding the *Simutenkov* decision - the question that should be raised for the purposes of this thesis: do the EMAA’s competition provisions satisfy these criteria? One may, at the outset, argue the EMAA’s provisions as they currently stand (i.e. excluding implementation rules) lack clarity, preciseness and their application is conditional to adoption of implementation rules and hence, may not have direct effect until these latter rules are put in place. This argument was in fact supported by the case law. According to the CoJ in *Demirel*, the fact that implementation rules have not yet been adopted for an association agreement may mean that its competition rules are not directly effective until they are put in place⁶⁷.

However, it may be argued that since competition provisions of the EMAA (and association agreements in general) are based on EU competition rules in terms of interpretation and content, and while such rules are directly effective within the Union in the first place, then they may automatically be transposed to the EMAA’s competition rules. However, the fact that there is no provision in these agreements, including the EMAA, promulgating the direct effect doctrine parallel to Protocol 35

⁶⁵ Case 192/89, *Sevince v. Staatssecretaris Van Justitie*, [1990] E.C.R. I-2133, para.14

⁶⁶ Case C-265/03, *Simutenkov* [2005] E.C.R. I-2579; Jacobs, F. G. (2008) “Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice” Dashwood and Maresceau (Eds.), *Law and practice of EU external relations*, CUP, pp.16-17

⁶⁷ Geradin (2004) *op.cit.*, p.41; Case 12/86, *Meryem Demirel v. Stadt Schwabisch Gmund* [1987] E.C.R. 3719

of the European Economic Area Agreement (EEA) renders this a moot point⁶⁸. While it is true that the EMAA does not explicitly address the doctrine of direct effect, it does not necessarily exclude its applicability. For instance, in *Sevince*, the CoJ adopted its judgment based on the decision of Association Council of the EU-Turkey (then EEC-Turkey) Association Agreement; nonetheless the latter did not explicitly address the doctrine of direct effect in the first place⁶⁹.

Furthermore, on many occasions, the EU case-law apply/adopt principles that are not stipulated under the TFEU, directives, primary or secondary legislations. In other words, one should not rely on the fact that the EMAA has not addressed the direct effect doctrine. Moreover, Article 218(7) TFEU [ex. 300(7) EC] made clear that the EMAA, as one of the agreements concluded in accordance with Article 218, is binding to the Union and its member states, which may indeed imply a direct effect grant⁷⁰. In fact, recent case law suggests that the treatment of direct effect still remains unaltered from the above-mentioned cases.

For instance, in *Mohamed Gattoussi v. Stadt Rüsselsheim*, the question of direct effect was explicitly raised. Particularly, Gattoussi, a Tunisian national residing and working in Germany through an unlimited work permit, invoked Article 64 of the Euro-Mediterranean Association Agreement with Tunisia which provides for non-discriminatory treatment in relation to the working conditions on Tunisian nationals across member states. Gattoussi invoked Article 64 after German authorities have decided to limit his permit since he no longer lives with his German wife (the initial basis for which the unlimited permit was granted). The CoJ held that Article 64 was directly effective and could hence be invoked in Germany⁷¹. To recap, competition provisions of the EMAA have direct effect in the EU (arguably) prior to the adoption of implementation rules, but certainly following their adoption.

⁶⁸ The Protocol expressly provided that competition rules of the agreement be directly effective and applicable.

⁶⁹ See Case 192/89, *Sevince v. Staatssecretaris Van Justitie*, [1990] E.C.R. I-2133

⁷⁰ Article 218, Treaty on the Functioning of the European Union, [2007], O.J. C.306/01

⁷¹ Case C-97/05, *Mohamed Gattoussi v. Stadt Rüsselsheim*, [2006] E.C.R. I-11917

1.4.2.2 Direct effect in Egypt

The case of direct effect in Egypt lacks relevant case law on the matter. Most of the disputes on international agreements in general focused on whether or not they would prevail over domestic laws and regulations in the event of conflict among their stipulations. Decisions in these cases tended to favour international agreements over domestic laws so long as they comply with the terms of Article 151 of the Egyptian Constitution which provides that international agreements, treaties and conventions gain the force of law following their conclusion, ratification and publication⁷².

The only (fairly) relevant case that was found in this regard is where an importer appealed the Authority for Environmental Affairs' decision that declined a permission of entry of one of its shipments since it contained some non-environmentally friendly material. The High Administrative Court of Egypt refused the appeal on the basis of the terms of the Basel Convention to which Egypt is a party and indicated that Article 151 made clear the force of law of conventions following their ratification and publication⁷³. This case shows that provisions of international agreements are directly effective. In fact, the Court in this case invoked the Convention and Article 151 voluntarily (i.e. with no request from any of the parties involved). This may *a priori* imply that concerned parties may have the right to invoke provisions of international agreements based on Article 151. But how can one apply Article 151 to the question of direct effect of the EMAA's provisions?

The Egyptian system understandably lacks literature on direct effect of the EMAA at this stage – aside of international agreements in general. Commentators seem to have focused on provisions of the EMAA, alongside direct effect in the EU as a well-recognized doctrine thereof. To determine whether or not the EMAA's competition provisions and Association Council's decisions in relation to their application have direct effect in Egypt, one should first question the degree of recognition of international agreements in general within the Egyptian legal system. Article 151 signifies that competition provisions of the EMAA do comprise part of the Egyptian

⁷² Article 151, Constitution of the Arab Republic of Egypt

⁷³ See Judgement of the High Administrative Court of Egypt, Appeal No. 8450 of year 44 Judicial.

legal system as of their publication in the Official Gazette. Does this mean, however, that decisions of the EMAA's Association Council are directly effective before Egyptian Courts?

This inquiry requires a thorough reading of Article 34, its Declaration by the European [Union] and Article 151 of the Egyptian Constitution; all of which are to be read in conjunction. Arguably, Article 151 implies a case of direct effect of the EMAA's competition provisions. If read, however, in conjunction with Article 34(2) and the Declaration by the European [Union] on Article 34 of the EMAA (which provides for application of TFEU rules until adoption of implementation rules), the situation may be viewed differently. This is because Article 151 intends application of the EMAA's provisions themselves and not those of the TFEU. Indeed, the Declaration by the European [Union] on Article 34 of the EMAA refers to the application of the TFEU rules, but this is arguably, not the meaning intended under Article 151. If the application of Article 34(1) is pending the adoption of implementation rules (which is the case today), then it should be declared inapplicable and hence shall not be directly effective in Egypt pending the adoption of these rules. In other words, Article 34 shall not have direct effect until it becomes operational (i.e. until implementation rules are put in place by the Association Council).

1.5 CONCLUSION

The Egyptian government encountered several pressures to adopt its own competition law. Among these pressures was that posed by the EU through the conclusion of the EMAA, which included competition rules that were mostly based on those of the EU. Egypt also encountered two (internal) pressures; first, a religious and constitutional pressure to tackle monopoly on the basis that *Shari'ah*, a constitutional underpinning in Egypt, explicitly condemns it. However, there seems to exist no direct evidence that obliges the legislator, relevant authorities or courts to follow Islamic law in this respect. Nonetheless, it is argued that Article 2 of the Egyptian Constitution implies the desire to reflect or comply with *Shari'ah* principles within the Egyptian Legal System. Second, and arguably a more compelling (internal) pressure than the former, is the 1991 privatisation programme that triggered some structural changes in Egypt (particularly, transfer of monopoly from public to private sector) that eventually pressured the introduction of competition law.

The language of the EMAA's competition provisions may at first sight imply that it imposes on Egypt an obligation to harmonize its laws with EU ones. However, deeper insights refute this and suggest it was in fact Egypt's responsibility to adopt its own law. Nevertheless, it is arguably desirable to approximate Egyptian Competition Law with that of the EU. This may be rationalised by the ideology that the EU may want to ensure that a *comparable treatment* is provided to EU investors in Egypt.

Even though the Association Council has not yet adopted the implementation rules pertaining to the application of Article 34(1) of the EMAA, it may still arguably have direct effect before investigating authorities of EU member states. This is based on the premise that while Article 34(1) is primarily based on EU competition rules, which have direct effect in the EU, so should Article 34(1) also be directly effective. In this case, it may satisfy the criteria for direct effect discerned by the CoJ in *Demirel*. In contrast, however, Article 34(1) may not be invoked before Egyptian Courts prior to the adoption of implementation rules. This is because EU competition rules may remain applicable to disputes within the context of Article 34(1) until implementation rules are adopted and

that Article 151 of Egyptian Constitution grants direct effect to provisions of international agreements only. Hence, this excludes direct effect of EU rules.

CHAPTER 2

THE COMPARATIVE LAW METHODS IN CONTEXT IN RELATION TO THE STUDY ON EU AND EGYPTIAN COMPETITION LAWS⁷⁴

⁷⁴ This chapter was presented in the workshop on the use of comparative law in postgraduate research held by the British Association of Comparative Law (BACL) at the University of Edinburgh, 1-2 June, 2009

CHAPTER 2

THE COMPARATIVE LAW METHODS IN CONTEXT IN RELATION TO THE STUDY ON EU AND EGYPTIAN COMPETITION LAWS

2.1 INTRODUCTION

The reception of foreign law and legal transplantation became a major comparative law debate during the second half of the 20th Century. This trend emerged as a result of the European reception of Roman law that took place about a Century before. It is widely agreed that the lessons and methods learnt from the dissemination of Roman law throughout several areas of Continental Europe and Scotland are significant. In fact, it may have inspired legal systems of many countries to follow the same or similar pattern⁷⁵.

The codification era that terminated the *ius commune* in Europe may best illustrate this inspiration. For instance, the French Civil Code (also known as *Code Civil* - codified in 1804), given its global duplication, was contemplated as one of the prominent codifications in Europe. It travelled to the African and Middle Eastern regions – Egypt is indeed a notable example⁷⁶. However, the literature on comparative law is not confined to receptions and transplants of laws. The 1970-80s experienced a dramatic growth in the literature on new principles, methods and approaches to comparative law.

The aim of this chapter is to investigate and elucidate the relevance of comparative law methods to the present study. To be more precise, it will discuss the methods that will be employed in the thesis and investigate in detail how their application will proceed. Thus, the discussion of comparative law methods will only be limited to the methods that will be employed in this thesis. The chapter will start off by reviewing the history and success of comparative law in Europe. It will then move on to analyze the relevance and importance of comparative law methods with reference to the present study. It will

⁷⁵ See Graziadei, M. (2006) “Chapter 13 – Comparative Law as the Study of Transplants and Receptions” *The Oxford Handbook of Comparative Law*, Reimann, M. and Zimmermann, R. (Eds.), OUP, pp.442-445

⁷⁶ Ibid, pp.447-449

then explore the history of the Egyptian Legal System and its classification. And, finally, it will discuss the concept of legal harmonization, its relevance, criticisms, and success.

2.2 COMPARATIVE LAW: HISTORICAL BACKGROUND, METHODS AND PRECEPTS AND THEIR RELEVANCE

2.2.1 Historical background of comparative law in Europe

Comparative law in Europe went through two eras: the *ius commune* and codification eras. The 17th Century experienced the emergence of the “*ius commune*” of Continental Europe⁷⁷. The age of *ius commune* experienced a common evolutionary process of distinction between laws and scholarship among both judges and lawyers in different jurisdictions during the 17th Century. As Schlesinger illustrates, a lawyer who is located in Belgium and seeks legal advice on a Belgian rule may consult some material prepared by an Italian or French national or university as long as it is convincing enough. The Belgian Court will not reject reliance on such work on grounds of the concerned scholar’s nationality. Put differently, legal scholarship and material comparison was a widely acknowledged research method at the time, irrespective of the distance and nationality of the sources at stake⁷⁸.

In fact, when lawyers and judges relied on material of this sort, they contemplated them as similar i.e. not deriving from a foreign source. Thus comparison of legal rules at the time took an “integrative” rather than “contrastive” approach. However, the late 18th Century experienced a different style of thinking in Europe; namely “the age of codification”. During this period, all countries of the European Continent had their rules codified and translated in their own language. Lawyers and judges contemplated rules and material originating from a different country as foreign source. Hence, comparative law started taking a different path. Contrary to the past, comparisons focussed more on

⁷⁷ The *ius commune* is the Latin terminology for common law. For further detail on the concept itself, see Husa, J. (2009) ““We the judges...”: Discovering constitutional *ius commune Europaeum*” Tilburg Institute of Comparative and Transnational Law Working Paper No. 2009/1, available from: (<http://ssrn.com/abstract=1334607>) accessed 28-07-2009

⁷⁸ Schlesinger, R. B. (1995) “The past and Future of Comparative Law” (43), *American Journal of Comparative Law*, pp.477-478

the variances rather than resemblances - a “contrastive approach” (unlike the *ius commune* era)⁷⁹.

However, such contrastive approach merely prevailed until the past 2-3 decades; whereby comparative law started fading away from this pattern and recalling back to the “integrative approach” of the *ius commune* era. This reform was justified by the free movement of people, goods and services policy on the international level, alongside globalisation. In relation to comparisons, scholars explored the shared features of legal systems instead of merely distinguishing them. Europe may be taken as a simple illustration for such pattern. The evolution of the EU may be seen as an unequivocal recall of the *ius commune*. In fact, Schlesinger names this approach as the “new *ius commune*”. Interestingly, he argues that since the EU is composed of civil and common law systems, the *new ius commune* had to be confined to the common features of both systems⁸⁰.

Later on during the second half of the 20th Century, comparative law was characterized by its ability to provide knowledge. It was perceived that knowledge dramatically arose during this period, compared to the first half of the Century. Particularly, given the relative lack of literature during the first half of the 20th Century, one may have been able to handle most of the comparative law literature in just a matter of weeks, while nowadays it may take years, if at all attainable in the first place. Moreover, the comparative law scholarship during the second half of the 20th Century, established a “world map of law”. It was perceived that most comparative law scholars at the time were reasonably familiar with the existing models (such as Rene David’s and Zweigert and Kotz’s models on the definition of families according to “style”) which Reimann believes that their models have become more or less out-dated relative to nowadays’ literature. This is based on three grounds⁸¹.

⁷⁹ Ibid, pp.478-479

⁸⁰ Ibid, pp.478-480

⁸¹ Reimann, M. (2002) “The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century” (50), *American Journal of Comparative Law*, pp.674, 676

First, the categorizations that were conducted between legal systems were not as precise as they seemed. For instance, when we classify legal systems as common, civil or mixed, this is a mere superficial or un-detailed classification. In other words, there lies a more in-depth distinction than the simple and generic classification of civil or common. Many legal systems - not necessarily called mixed or combined between civil and common law - add some constituents from other systems. In fact, the distinction does not lie in “substantive rules” but rather in “institutions”, “procedures”, and “techniques” that are likely to be modified in the future. Second, one should not overlook the history and development of a legal system at the expense of the rules set forth. For instance, looking at a system’s “*legal traditions*” may be a fine way. In addition, exploring a system’s “*legal cultures*” may enrich insights (such as “economies”, “religions”, “social habits” etc.). Third, there somehow exists a correlation between “legal families”, “traditions”, and “cultures”⁸².

Although it is commonly perceived that comparative law as such attained significant success through adopting a distinguished framework of knowledge, it is sometimes suggested that it failed in several respects. For instance, some perceive that it failed to develop an established and comprehensive discipline. In addition, it hardly evidenced its ability to produce an in-depth approach to the “general interest”. This may be demonstrated in respect of aspects such as the structure and development of legal systems or the link between “law”, “society”, and “culture” whether on regional or global basis⁸³.

Moreover, according to Reimann, the failure of comparative law evolution may be discerned in various respects. First, the majority of literature tends to give too much attention to the approach developed by European scholars throughout the preceding

⁸² Ibid, pp.677-678

See also Zweigert, K. and Kotz, H. (1998) “*An Introduction to Comparative Law*”, 3rd Edition, Tony Weir Transl., pp.66-67; Berman, H. J. (1983) “*Law and Revolution: The Formation of the Western Legal Tradition*” Harvard University Press; Watson, A. (1981) “*The Making of the Civil Law*” Harvard University Press; Barton, J. H., Gibbs, J. L., Li, V. H. and Merryman, J. H. (1983) “*Law in Radically Different Cultures*” West, Thomson Reuters

⁸³ Reimann (2002), *op.cit.*, p.685; Legrand, P. (1996) “European Legal Systems Not Converging” (45), *International and Comparative Law Quarterly*, British Institute of International and Comparative Law p.3; Frankenberg, G. (1985) “Critical Comparisons: Re-thinking Comparative Law” (26), *Harvard International Law Journal*, Harvard College, p.441

Century. Such approach focused to a large extent on the “Country” and “Western tradition” i.e. from a Western Legal Systems perspective⁸⁴. In addition, it is argued that the development of comparative law failed to adopt a body of empirical methods or, in other words, statistics of legal systems for the purposes of conducting comparisons. The lack of empirical data as such makes observations and conclusions on comparative law studies based on individual presuppositions and assumptions that may undermine credibility⁸⁵. Notwithstanding these criticisms, it is perceived that the comparative law methods that exist nowadays may be fruitfully deployed in the present study.

2.2.2 Identification of the legal systems under scrutiny – Can a comparative study take place between entirely different systems?

*“The comparatist will always be haunted by this memorable and magical expression: ‘incomparables cannot be usefully compared’”*⁸⁶.

The above quotation arguably serves as a guiding principle for comparative studies. Nevertheless, as Platsas writes, sensing comparability is in itself a complicated process. One should give attention to the wording “usefully”. However, some comparatists use terminologies other than *usefully*. For instance, terms such as “sufficiently comparable, reasonably comparable, fruitfully comparable or meaningfully comparable” are commonly used⁸⁷. Sacco argues that at the very outset of conducting any comparative study, a vital question should be raised. Is it possible to carry out a comparative study between two legal systems that are substantially distinct? An instant answer according to him was that there must be a *common denominator* between the two legal systems for

⁸⁴ Reimann (2002), *op.cit.*, p.685

For further criticisms on comparative law in Europe, see Reimann, M. (1998) “Stepping Out of the European Shadow: Why Comparative Law in the United States must Develop its own Agenda” (46), *American Journal of Comparative Law*; Reimann, M. (2001) “Beyond National Systems: A Comparative Law for the International Age” (75), *Tulane Law Review*, Tulane University Law School.

⁸⁵ Ibid, p.686

⁸⁶ Zweigert, K. and Kotz, H. (1998) “*An Introduction to Comparative Law*” 3rd Edition, OUP, Oxford, p.34, as cited by Platsas, A. E. (2008) “The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks” 12(3), *Electronic Journal of Comparative Law*, available from: (<http://www.ejcl.org/123/art123-3.pdf>) accessed 24-06-2009, p.5

⁸⁷ See Örüciü, E. (2004) “*The Enigma of Comparative Law*” Martinus Nijhoff Publishers, Leiden/Boston, p.29, as cited by Platsas (2008), *op.cit.*, p.5

a study as such to take place⁸⁸ or as Platsas indicates: Legal systems that have “some sort of unifying language of application; by some common denominator”⁸⁹.

*“We are in the habit of positing a single form for each plurality of things to which we give the same name”*⁹⁰.

Referring to the afore-mentioned quotation, Plato’s theory of ‘one-over-many’ entails “that human thought is unitary in essence; yet the implementation of the *Denken* might differ in practice”. To put Plato’s theory in a simpler manner, Platsas provides an example that compares horses. Despite the comparison involves horses that are different in colour and quality, yet comparing the same category of species, from a Platoian perspective, these differences are more or less *meaningless* on the basis of his belief that: “A unitary, eternal, indivisible and unchangeable essence is found beneath variable qualities of the same thing”⁹¹. The theory of Plato as such is easily applicable in the field of comparative legal studies. If we come to conduct a comparative study of the competition rules of two different legal systems, we may find that the rules of one system may be more or less developed than the other, yet protecting the same issue: The competitive process⁹². Are the EU and Egypt two *usefully* comparable legal systems? Put differently, do they share a *common denominator*?

Patently, the EU and Egypt are distinct legal systems in two major respects. First, the EU, on the one hand, is an Economic and Political Union comprised of 27 Member States. Egypt, on the other hand, is a single state. It is on this basis that one may ask why the present comparative study is conducted between two legal systems that *function* in a different manner and have different objectives (in general), rather than, for instance, comparing the French Competition Law with the Egyptian one. Second, it is

⁸⁸ See Sacco, R. (1991) “Legal formants: A dynamic approach to comparative law” (39), *American Journal of Comparative Law*, American Society of Comparative Law, p.6

⁸⁹ Platsas (2008), *op.cit.*, p.6

⁹⁰ Plato, *The Republic*, 596a, as cited by Platsas (2008), *op.cit.*, p.11

⁹¹ See Plato’s theory of the forms, as cited by Platsas (2008), *op.cit.*, p.11

⁹² For instance, it will be argued in chapter four that EU and Egyptian Competition Laws require different market share thresholds for finding dominance. Nevertheless, they both aim to protect the competitive process as a means for maximizing consumer welfare.

unquestionable that the EU's legal system and institutional structure are far more developed than the Egyptian ones⁹³.

Nevertheless, however distinct the EU and Egyptian Legal Systems are, one may consider the EMAA as a *common denominator* of the comparative study. In fact, it is on the premise that the agreement was concluded between the EU and Egypt that the present comparative study between their competition rules commenced in the first place. Apart from subjecting the EMAA's competition rules to both systems, the *common denominator* factor appears in that the Association Council shall adopt the implementation rules on competition that ought to be followed by the Association Committee in future competition disputes (so long as they affect trade and in turn fall within the scope of Article 34 of the EMAA). Hence, one may submit, pursuant to Zweigert and Kotz's criterion, that the EU and Egypt may be *comparable* legal systems and may thus be *usefully compared*.

2.2.3 The subject of the comparative study: An investigation of similarities or differences?

Determining whether a comparative study will tackle the similarities or differences or will obtain a balance between both is essential for the purposes of certainty and transparency. The inquiry of whether to favour similarities over differences or vice versa in comparative studies is subject to debate. While history has shown that the literature on the *ius commune* European legal culture somehow accepted similarities by default (integrative approach) and focused more on the differences, this ideology seems to have faded away⁹⁴.

The framework of comparative studies experienced an alteration in the 18th Century by *Montesquieu* who attempted to obtain a balance between the value of similarities and differences. Yet, when it came to making a choice of either, he favoured comparison of

⁹³ For instance, it is argued in chapters three, four and five that the degree of economic expertise in competition law in Egypt is far lesser than that in the EU (be it in relation to lawyers, regulators, enforcers, judges, etc.). It is furthermore argued that the Egyptian government's desire to increase economic expertise exemplifies a reflection of Islamic principles as well as the EU's approach in relation to the implementation of competition rules.

⁹⁴ Dannemann, G. (2006) "Chapter 11 – Comparative Law: Study of Similarities or Differences" *The Oxford Handbook of Comparative Law*, Reimann, M. and Zimmermann, R. (Eds.), OUP, p.385

differences. According to him, there are some factors that decide on the appropriateness of the law at stake for the country: “Climate, geographical, cultural, religious, economic, moral and political factors”. This is to say, according to him: “It is unlikely that the laws of one nation can suit another”. Furthermore, he recommends: “Not to consider as similar cases with real differences or to overlook differences in those which appear similar”⁹⁵.

In fact, the philosophy of presuming similarity in comparisons or in Latin terms: “*praesumptio similitudinis*” is quite relevant to the arguments developed by Sacco and Platsas on the *common denominator* factor or as the latter scholar often names: “Common intellectual denominator of legal thought”⁹⁶. To enable the comparability of legal systems and indeed its *usefulness*, the comparatist should fulfil a prerequisite relating to the commonality of some concepts/rules in the legal systems under scrutiny. While this process (i.e. sense of commonality of concepts) usually takes place prior to conducting a detailed comparative study, through a superficial overview with the aim of determining whether the legal systems are comparable in the first place, the comparatist will resort to the *praesumptio similitudinis*⁹⁷. However, the conception of *praesumptio similitudinis* in itself is subject to criticism.

For instance, Gutteridge is a comparative law scholar who promotes emphasis on the differences. While opting for the legal system to be compared, he, interestingly, suggests that one should select systems similar in terms of the stage of “legal”, “political” and “economic development”. This is to evade “illusionary comparison”⁹⁸. Moreover, Ancel adopted the conception of “*comparaison contrastee*”; one which gives more attention to contrasts and divergences rather than similarities and convergences. According to him, dissimilarity is regarded as the starting point to which a comparative practitioner would notice while studying legal systems. Furthermore, he prudently

⁹⁵ See Montesquieu, (1748) “*The Spirit of Laws*” Part I, Chapter 3, Cohler, A. M., Miller, B. C. and Stone, H. S. (Eds.), 1989, pp.8-9 as cited by Dannemann (2006), *op.cit.*, p.385

⁹⁶ Platsas (2008), *op.cit.*, p.11

⁹⁷ It is often argued in this thesis that the existing similarities between EU and Egyptian Competition Rules reflect the influence of the former on the latter.

⁹⁸ See Gutteridge, H. C. (1946) “*Comparative Law: An introduction to the comparative method of legal study and research*” Cambridge (Eng.): The University Press, pp.8-9, as cited by Dannemann (2006), *op.cit.*, p.389

argues that studying fundamentally distinct legal systems is likely to provide many results, in contrast with a study involving resembling legal systems⁹⁹.

In fact the emergence of Ancel's conception as such arguably led to the evolution of more ideas; most notably, functionalism. For instance, Frankenberg advised comparative practitioners "to recognize that they are participant observers" to whom their role was to review foreign legal systems from their domestic legal system's standpoint – a context which disables them to be as "neutral as functionalists would like to see them"¹⁰⁰. The similarities presumption, hence, should "be abandoned for a rigorous experience of distance and difference"¹⁰¹. However, some anti-functionalist scholars disagree with the fact that it (functionalism) focuses on results. For instance, according to Hyland, "all levels of difference among legal systems – whether in terms of concepts or results – should be acknowledged rather than suppressed"¹⁰². Thus, as noted by Dannemann, this entails a presumption of "dissimilarity"¹⁰³.

To decide whether the thesis will focus on the similarities or the differences, or otherwise obtain a balance between both methods, one should thoroughly consider the demands of the present study. In other words, what is more important? Is it the inquiry of similarities or is it the differences that are more important? While the present study is initially based on the EMAA, it may be essential to focus not only on the differences; but also on the similarities that may indeed encourage EU/Egypt trade and that arguably reflect the influence of EU Competition Rules (and Islamic principles on some occasions) on Egyptian Competition Law. In addition, employing functionalism (as will be discussed in the following part) provides the comparatist to focus on the similarities for the purposes of investigating "*equivalents*" between the legal systems under comparison¹⁰⁴. More to the point, if a comparatist is to adopt *Montesquieu's* vision of

⁹⁹ See Ancel, M. (1971) "*Utilite et methodes du droit compare: Elements d'introduction generale a l'etude comparative des droits*" p.65, as cited by Dannemann (2006), *op.cit.*, p.389

¹⁰⁰ See Frankenberg, G. (1985) "Critical Comparisons: Re-thinking Comparative Law" (26), *Harvard International Law Journal*, p.441; Dannemann (2006), *op.cit.*, p.390

¹⁰¹ See Frankenberg (1985), *op.cit.*, p.453

¹⁰² See Hyland, R. (1996) "Comparative Law" *A Companion to Philosophy of Law and Legal Theory*, Patterson, D. (Eds.), p.194

¹⁰³ Dannemann (2006), *op.cit.*, p.390

comparison (who favours differences over similarities) in the present study, he will be sacrificing the need and essence of functionalism (i.e. law in theory *and* practice). For this reason, it would be prudent to deploy a balance between similarities and differences.

2.2.4 Contextualizing the importance and relevance of functionalism

“The vibrant heart of the comparative method in the most dynamic branch of law, comparative law, dances to the tune of functionality of comparisons. By all means, if there is one principle that the method adheres to, it is functionality”¹⁰⁵.

Some argue that comparative law should endorse a “functional approach”¹⁰⁶. But what is meant by a “functional approach” to comparative law? A “functional approach” is an approach which emphasises that the comparison of laws should not merely examine what they address, but should also explore what they intend to tackle in their own legal system. This is in addition to the vision of how the rules are implemented in practice¹⁰⁷. However, as Michaels notes, it would be irrational to say that there exists only a single functional method. Thus the foregoing definition represents a very generic idea of functionalism¹⁰⁸.

Comparative law scholars seem to agree on some common characteristics of functionalism. First, given that a functional approach is more concerned with the “effects” of the rules rather than the rules themselves, the object of comparative studies largely target judicial decisions. In other words, comparative studies intend to primarily tackle the case law of the legal systems at glance. Second, the role of a functional

¹⁰⁴ Platsas, A. E. (2008) “The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks” 12(3), *Electronic Journal of Comparative Law*, available from: <http://www.ejcl.org/123/art123-3.pdf> accessed 24-06-2009, p.10

¹⁰⁵ Ibid., p.2

¹⁰⁶ Proponents of a functionalist method to comparative law are the likes of Ancel, M. (1971) “*Utilite et methodes du droit compare: Elements d’introduction generale a l’etude comparative des droits*”; Collins, H. (1989) “Methods and Aims of Comparative Contract Law” (11), *Oxford Journal of Legal Studies*, OUP, pp.396-406; Cruz, P. D. (1999) “*Comparative Law in a Changing World*” 2nd Edition, Routledge, Cavendish, p.230, aside of Reimann (2002), *op.cit.*, Reitz (1998), *op.cit.* [referred to above]

¹⁰⁷ Reimann (2002), *op.cit.*, p.679

¹⁰⁸ See Michaels, R. (2006) “Chapter 10 – The Functional Method of Comparative Law” *The Oxford Handbook of Comparative Law*, Reimann, M. and Zimmermann, R. (Eds.), OUP, pp.340-343

approach is to unite its “factual approach with the theory that its objects must be understood in the light of their functional relation to society”¹⁰⁹.

This means that functionalism acknowledges the relationship between law and society but concurrently splits it. Third, functionalism acts as “*tertium comparationis*”. This signifies, according to Michaels, that “institutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfil similar functions in different legal systems”¹¹⁰. The question that lies beneath this is to what extent does this third characteristic relate to the present study? And how can it be applied? *Tertium comparationis* is an imperative Latin term to which one must consider when conducting comparative studies. It is an indispensable component of the comparative method¹¹¹. The terminology refers to the starting point of comparisons or, as Reitz names: “the common point of departure for the comparison”. It signifies the value to which, say, two concepts of two legal systems may have in common¹¹².

The meaning of *tertium comparationis* as such is closely linked to the arguments favouring the *common denominator* factor. In this respect, Platsas argues that although legal functionalism may not comply with the *Platoian* approach entailing that humans are broadly characterised by “unity of thought”, unless the *praesumptio similitudinis* was applicable¹¹³, comparative law’s functionalism of nowadays somehow adheres to it. More specifically, functionalism as such resembles *Plato*’s ‘one-over-many’ theorem in the sense that “*both* seek similarities in the main”. Therefore, the criterion for the *usefulness* of comparisons, similar to *Plato*’s approach in humans, is attained in functionalism in legal studies¹¹⁴.

Furthermore, it is inevitable as Reitz submits that *tertium comparationis* in comprehensive comparative study ought to cover all of the following probabilities or, at

¹⁰⁹ Ibid, p.342

¹¹⁰ Ibid

¹¹¹ See Zweigert, K. and Kotz, H. (1987) “*An Introduction to Comparative Law*” 2nd Edition, trans Tony Weir, p.30

¹¹² Reitz (1998), *op.cit.*, p.622

¹¹³ In contrast with Platsas, it is argued that for legal systems to be comparable and functionalism to be employed, the *praesumptio similitudinis* should be assumed among some components of these systems.

¹¹⁴ See Platsas (2008), *op.cit.*, p.11

least, consider the existence of one or more. The possibilities may be summarized as follows:

- The two legal systems share “the same legal rule or legal institution” (‘the first possibility’);
- They stipulate “different rules or institutions” yet serving “the same function” (‘the second possibility’);
- They produce distinct outcomes for a single event/case (‘the third possibility’);
- The said event/case is not covered by one of the legal systems under comparison (‘the fourth possibility’)¹¹⁵.

Putting the above-mentioned possibilities in context signals the indispensability of considering *tertium comparationis*. The first possibility is prone to be covered by the study, whether with respect to the ‘same legal rule or legal institution’. With regards to the ‘legal rule’, this is evident from the fact that both the EU and Egypt are subject to Article 34 of the EMAA, so long as they affect they “may affect trade” between both parties¹¹⁶. With respect to the ‘legal institution’, in the same vein, the Association Committee in respect of anti-competitive practices scrutinizes both parties. The second possibility will, moreover, be covered by the study. The EU and Egypt implement distinct rules that nevertheless serve the same purpose or function: the protection of competition.

Furthermore, given that the Egyptian system already employs an effects-based approach to abuse of dominance, and while the EU is arguably still in transition (although the Commission intends to employ this approach in the future – as will be developed in chapters 3 and 4), this *may* lead to different judgements of disputes of the same kind¹¹⁷.

¹¹⁵ Reitz (2002), *op.cit.*, p.622

¹¹⁶ See Article 34(2), Euro-Mediterranean Agreement Establishing an Association Between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, on the other part, (2004)

¹¹⁷ For instance, in part 4.5 (chapter four), the standard of effects-based approach will be compared under both systems. While it will be argued that the EU Commission adopts a *likely* or *capable* effects standard, the Egyptian regime, on the other hand, employs an *actual* effects standard. This means that abusive practices that are caught under EU Competition Law may not be necessarily prohibited under Egyptian Competition Law *unless* they generate *actual* effects on competition and consumers. This particularly shows a reflection of Islamic principles.

This is to say that the third possibility is covered, at least at the present stage. And finally, while there may be practices that are not regulated under the Egyptian law like the practice of excessive pricing, as opposed to the EU system (although investigated only under exceptional circumstances)¹¹⁸, this means that the fourth possibility is also considered. Yet the question that should be raised in this respect: how does *tertium comparationis* function in comparative studies? As Reitz indicates, first, it serves as the guiding method for comparisons. In other words, it consistently keeps the comparatist on track with the comparison (preventing him from losing focus). Second, it stresses the significance of inquiring about “functional equivalence” in comparisons¹¹⁹.

2.2.5 The rules of legal translations and their relevance

Comparative studies are likely to require translations. Since it is assumed that the researcher concerned is confronted by two or more legal systems with different languages - as is the case with respect to the present study (English and Arabic). In fact, it is prudent to submit that most of the “legal rules and institutions” adopted nowadays were not initially formulated by legislators, but are merely those used in other jurisdictions. These rules are usually accompanied by a translation on the basis that they originate from countries using different languages. Legal translation is the job of a jurist. Since the process of translation provides the translator to ascertain the meaning of the related sentence/term and subsequently explore an equivalent to it in the other language¹²⁰.

However, in a legal system like the Egyptian, legal translation may either be the job of the legal researcher/practitioner or the competition authority itself. In fact, the Egyptian Competition Authority (‘ECA’) translated the provisions of Law No. 3/2005 and its Executive Regulations incorporated in this thesis. Thus, the task of the practitioner may appear either within the scope of competition law practice, given that the ECA does not usually translate its decisions, or with respect to other relevant laws or reports that are

¹¹⁸ Similarly, Egyptian Competition Law does not regulate margin squeeze through a below-cost downstream pricing strategy. This discussion will be developed in chapter four.

¹¹⁹ Reitz (2002), *op.cit.*, p.623

¹²⁰ Sacco, R. (1991) “Legal formants: A dynamic approach to comparative law” (39), *American Journal of Comparative Law*, pp.11, 13-14

yet to be translated. It is however, inevitable, as suggested by Sacco, that the translator will either encounter difficulties or easiness in this process. This probably depends on how closely correlated the two languages are. For instance, a translator may encounter obstacles when one or more words do not linguistically have their corresponding in the other language¹²¹.

If one takes English and Arabic as comparable languages, it will be found that in many respects, they may not be closely correlated. Hence, it may be advisable to consult an approved legal translation agency, in the event of encountering hurdles in the process. Moreover, as Sacco further submits, a “complete permanent correspondence between two expressions belonging to two different languages can be created only artificially”. According to him, ‘artificial’ entails that persons who have “authority” in a certain jurisdiction agree that a term shall have a certain meaning or shall be similar to a corresponding term in another jurisdiction¹²².

2.3 THE EGYPTIAN LEGAL SYSTEM – AN INFLUENCE OF FRENCH LAW, ISLAMIC LAW OR IS IT A MIXED SYSTEM?

The Egyptian legal system is a civil law system. It is questionable, however, as to where the influence of its civil code derives. In other words, is it of French law influence, or is it based on Islamic law? Or is it a mixture of both?¹²³ In order to investigate this inquiry, it may be worthwhile reviewing the history of the Egyptian Legal System. Providing an answer to the inquiry will follow this. While this part will establish that the Egyptian Civil Code is a mixture of Islamic and French laws, the need to conceptualize the notion of mixed legal systems will then follow.

2.3.1 An overview of the history of the Egyptian Legal System: The rising influence of Islamic and French Laws

Before the advent of Islam in 641 A.D., Roman law administered Egypt. The influx of Islam was followed by the introduction of Islamic law, which remained about 1100

¹²¹ Ibid

¹²² Ibid, p.18

¹²³ Note that this question was raised by some commentators such as Shalakany, A. (2001) “Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise” 8(2), *Islamic Law and Society*, Koninklijke Brill NV, Leiden

years¹²⁴. While in power as the leader of Egypt during the early 1800s, Mohamed Ali somehow obtained the impact of French Law on Egypt. In 1875, Egypt experienced the introduction of the regime of “mixed courts” that was set to apply to disputes between foreigners or foreigners and Egyptians, whether in respect of criminal, penal, civil or procedural codes; namely “mixed codes”. For instance, the 1875 Civil Code of Egypt was “modelled” on the French Civil Code that was in force at the time. Indeed, an approval of a code as such had to be acquired from the occupational foreign powers (notably the British and French) that had a “privileged status” in the country. However, the regime of mixed courts did not last for long. A system of “national courts” was instead introduced in 1883. These Courts governed disputes (commercial, penal, civil, etc.) between Egyptians, while Islamic law and courts focused on family law issues between Muslims or Muslims married to non-Muslims, leaving other family law matters concerning non-Muslims to distinct courts¹²⁵.

The regime of mixed courts and *Shari’ah* courts was brought to an end in 1949 and 1955 respectively. Disputes that used to be settled by these courts were then referred to national courts that were named as “ordinary courts”. Consequently, the system of “mixed codes” was substituted by “national codes of universal application” which applied to both Egyptians and non-Egyptians. The 1949 Civil Code was an important component of them. It is no wonder why Tetley refers to the Egyptian system as “an intriguing *mixed legal system*, blending civilian rules fashioned, in style, structure and content, *on the model of the French Civil Code of 1804, with the law of Islam* and, in family law areas (such as marriage, divorce, filiations and alimentary obligations), with a variety of religiously-founded personal laws”¹²⁶.

2.3.2 Islamic Law v. French Law – The Case of Egypt

At the outset, it is necessary to define Islamic law as one of the main sources of law in the Middle Eastern region in general. “Islamic law” in essence means “Shari’a” (*‘Shari’ah’*). Islamic *Shari’ah* (or as pronounced in Arabic: “*Al-Shari’a Al-Islamiyya*”)

¹²⁴ Tetley, W. (1999) “*Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)*” available from: (www.cisgw3.pace.edu/cisg/biblio/tetley.html) accessed 21-06-2009, pp.19-20

¹²⁵ Ibid., p.20

¹²⁶ Ibid, pp.20-21

is “sacred law, that is a compilation of opinions and interpretations of religious legal scholars who studied the sacred texts of Islam during the first centuries of its existence”. Although in principle it is composed of four schools of thought: “*Hanafi*”, “*Malaki*”, “*Shafi*” and “*Hanbali*”, the reliance on them in practice is not exclusive. Account is given also to the “decrees of rulers, and in part on simple custom”¹²⁷.

As mentioned earlier, the Egypt Legal System was significantly influenced by the advent of Islam during the early ages. Nevertheless, Western scholarship took the stance that either the Egyptian Civil Code is partly Islamic or is not of an Islamic influence at all. For instance, Anderson appears to have downplayed the “Islamicity” of the code¹²⁸. In addition, he dismisses any view contemplating it as “European” in terms of origin; but rather a code that bears a “slight”¹²⁹ “debt to Islamic law”¹³⁰. More specifically, Anderson, in his empirical study on the Egyptian Civil Code, attempted to calculate the number of provisions that were rooted from Islamic law. Yet according to Shalakany, this approach was problematic in the sense that Anderson did not adopt a dividing line on how a “legal document” can be contemplated as “Islamic” from how it cannot. In fact, Islamic law is often taken into consideration by the Egyptian government while drafting its laws and regulations. A good example for this assertion is the 1949 Civil Code. This Code was found by the Egyptian Jurist Abdel-Razzak Al-Sanhuri who is often described as: “The master re-builder of Arab law in the twentieth century”¹³¹.

Sanhuri was a legislator and a researcher at the same time. His vision over the “Islamicity” of the Civil Code appears to have substantially changed throughout the period between 1942 and 1962. More specifically, Sanhuri in the Egyptian Senate has disclosed two stances in 1948. First, he contended that 3/4 or 4/5 of the code is merely based on the Egyptian case law. Later on, he stressed that the whole Civil Code’s

¹²⁷ Hill, E. (1977-1978) “Comparative and historical study of Modern Middle Eastern Law” (26), *American Journal of Comparative Law*, American Association of Comparative Law, p.292; note that chapter three will envisage extensive discussions on *Shari’ah* in general; and the views of these schools on monopoly and price control in particular.

¹²⁸ Anderson, J., N., D. (1954) “The Shari’a and the Civil Code” (1), *Islamic Quarterly*, pp.29-46, as cited by Shalakany (2001), *op.cit.*, p.202

¹²⁹ Coulson, N., J. (1964) “*A History of Islamic Law*” Edinburgh: Edinburgh University Press, p.153, as cited by Shalakany (2001), *op.cit.*, p.202

¹³⁰ Shalakany (2001), *op.cit.*, p.202

¹³¹ Ibid, pp.202-203

provisions are Islamic¹³². In fact, Sanhuri's approach in the Civil Code reflected Islamism. It specified that *Shari'ah* ought to be applied in courts by stating in Article 1 that: "In the absence of a provision of a law that is applicable, the judge will decide according to customs and in the absence of custom in accordance with the principles of the Islamic *Shari'ah*. In the absence of such principles the judge will apply the principles of natural law and the rules of equity"¹³³.

Furthermore, the Islamic law influence on the Egyptian Legal System is not only envisaged from the Civil Code. Even more importantly – as highlighted in the preceding chapter - Article 2 of the Egyptian Constitution explicitly indicates the function of Islamic law in the Egyptian system by stipulating that: "Islam is the religion of the state [...] and the principles of the Islamic *Shari'ah* are the major source of legislation"¹³⁴. On the other hand, there is no doubt that French Law has had an impact on the Egyptian Legal System. In fact, Watson, in an interesting study conducted in 1920, compared the Egyptian Civil Code with the French, French Canadian and English rules.

Particularly, Watson's conclusion may be summarised as follows: "The articles upon obligations in the Egyptian Code are *merely an abridgment* of those in the French Code with *modifications in details*, and the Egyptian Courts, unless they have already *a settled jurisprudence of their own*, naturally turn for guidance to the French commentators and to the decisions of the French Courts [...] *any commentary on the Egyptian Code must, therefore, be, in effect, a commentary on the French Code* indicating the points where the Egyptian legislator has introduced modifications"¹³⁵. However, one must not forget that the circumstances of nowadays may *substantially* vary from that during the 1920s.

Duplicating foreign law is not the case nowadays - although rules that are *mere abridgments of European codes* may remain unchanged from the old ages. The trend is

¹³² Ibid, p.204

¹³³ See Article 1(2), "*Al-qanun al-madani*" (*civil code*), Cairo, 1949, English translation by Perott, Fanner and Marshall, published by Le Journal du Commerce et de la Marine (Alexandria, 1952) as cited by Hill (1977-1978), *op.cit.*, p.296, 303

¹³⁴ Article 2, Constitution of the Arab Republic of Egypt

¹³⁵ Watson (1920) "*The Egyptian Law of Obligations: A Comparative Study with Special Reference to the French and the English Law*" as cited by Hill (1977-1978), *op.cit.*, p.285

rather taking the path of drafting laws with different or mixed influences. In fact, Sanhuri insists that the Egyptian Civil Code demonstrates a mixture of French and *Shari'ah* influence. As he stated before the Senate Committee of Civil Law where elaboration on the suggested code took place: “three-quarters or five-sixths of the provisions of this law are based on the decisions of Egyptian courts and on the existing legislation [which was substantially of French inspiration] ... I assure you that we did not leave a single sound provision of the *Shari'ah* which we could have included in this legislation without doing so ... we adopted all from the *Shari'ah* that we could adopt, having regard to sound principles of modern legislation”¹³⁶.

In other words, as Liebesny writes: “The period since World War II has been characterized in the Arab countries by intense codifying activities ... in the new codifications two main tendencies have made themselves felt: a trend toward synthesis of Islamic and Western legal ideas in fields such as contracts, and eclecticism in the selection of sources. The codes, including those that were based exclusively on Western law, no longer followed one specific European enactment, but took principles and rules from a variety of statutes”¹³⁷. More to the point, to further evidence that Egypt has a mixed legal system, the University of Ottawa conducted an interesting study in 2005 which found that the Egyptian system in particular is among “MIXED SYSTEMS OF CIVIL LAW AND MUSLIM LAW”, apart from finding that about half of the legal systems around the globe are “mixed” in general¹³⁸. This in turn raises the importance of conceptualizing the classification of ‘mixed legal systems’.

2.3.3 The concept of mixed legal systems in context

Traditionally, the terminology “mixed” in the context of legal systems encompasses only legal systems that are comprised of a mixture between civil and common law

¹³⁶ See Anderson, J. N. D. (1954) “The Shari'a and Civil Law” (1), *Islamic Quarterly*, p.30 as cited by Hill (1977-1978), *op.cit.*, p.303

¹³⁷ Liebesny, H. J. (1967) “Stability and Change in Islamic Law” 21(1), *The Middle East Journal*, Middle East Institute, Washington D.C., US, pp.30-31

¹³⁸ Study of the University of Ottawa available from: (<http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php>) Accessed 23-06-2009, as cited by Plessis, J. D. (2006) “Chapter 14 – Comparative Law and the Study of Mixed Legal Systems” *The Oxford Handbook of Comparative Law*, Reimann, M. and Zimmermann, R. (Eds.), OUP, p.482

systems¹³⁹. As Plessis states: “LEGAL systems generally are ‘mixed’ in the sense that they have been influenced by a variety of other systems”¹⁴⁰. According to him, “legal families” are a set of legal systems that have “certain shared features”. While comparative lawyers have distinct visions in respect of classifying legal systems, they concurrently adopt different approaches in relation to what these “shared features” are¹⁴¹.

Moreover, comparative lawyers may view the conception of mixed legal system from different perspectives. First, one cannot do anything to “attribute these systems to the ‘right’ family”. In other words, so long as these systems do not share similar characteristics as those of a certain family do, they remain in a “classificatory limbo”. Yet Reid argues that “traditional mixed legal systems” that have a “political autonomy and a developed legal literature” may attain an “equilibrium” that would thereby refute their attribution to “constituent systems”¹⁴².

Second, according to Örüçü, the concept of mixed legal systems should not be viewed from the perspective that a legal system need not be classified as sharing the same characteristics of a legal family and hence, joining its category. In other words, not every mixed legal system that shares the same characteristics with a particular legal family may necessarily fit therein. Instead, Örüçü favours the adoption of a “new ‘family trees’ approach” - one which takes into consideration that almost all mixed legal systems are mixed; yet to different levels. That said, systems will then be “regrouped” pursuant to the dominance of their “ingredient sources”¹⁴³.

Third, some suggest that the conception of “extensive mixture is such a distinctive feature of certain systems that they deserve to be regarded as a family in their own right”. The range of this “new category” would then be relative to the strictness of the

¹³⁹ Plessis, J. D. (2006) *op.cit.*, p.510

¹⁴⁰ *Ibid*, p.478

¹⁴¹ *Ibid*, p.480

¹⁴² See First Worldwide Congress on Mixed Jurisdictions – Salience and Unity in the Mixed Jurisdiction Experience: Traits, Patterns, Culture, Commonalities (2003), (78) *Tulane Law Review*, as cited by Plessis (2006), *op.cit.*, p.481

¹⁴³ See Örüçü, E. (2004) “Family Trees for Legal Systems: Towards a Contemporary Approach” Mark Van Hoecke (Ed.), *Epistemology and Methodology of Comparative Law*, pp.362-363, as cited by Plessis (2006), *op.cit.*, p.481

“criteria for admission to other families from which the mixes derive are applied”. In other words, the more lenient the application of the criteria for admission is, the lesser the number of legal systems that are classified under the new “family or mixed systems”, or indeed vice versa¹⁴⁴.

While the foregoing approaches make sense in terms of classification, they seem to neglect the imperativeness of “historical development” and “specific techniques of adjudication and legal doctrines” of the legal systems at stake, as Plessis suggests in relation to the University of Ottawa classification¹⁴⁵. For instance, Egypt and Algeria are classified under the category of “MIXED SYSTEMS OF CIVIL LAW AND MUSLIM LAW”. Indeed, they are commonly mixed in the sense that their legal systems employ both Civil and Islamic Laws. However, the classification is abstract enough not to take into account issues such as economic development, the timing of privatisation, etc. Hence, this is to submit that one cannot categorize mixed legal systems around the globe without avoiding superficiality; otherwise a study as such would last for years.

2.4 RECEPTIONS, HARMONIZATION AND TRANSPLANTATION OF LAWS: THE CASE OF THE EU AND EGYPT IN CONTEXT

2.4.1 Evolution of the concept of harmonization

“Borrowing”, as Watson suggests, constitutes “The most fruitful source of legal change”. Harmonization or unification of laws indeed represents a form of legal borrowing in the sense that one legal system borrows a rule(s) from another. According to Boodman, “harmonization, or the process of bringing about harmony, implies a state of consonance or accord; the combination or adaptation of parts, elements or related things, so as to form a consistent and orderly whole”¹⁴⁶.

¹⁴⁴ Plessis (2006), *op.cit.*, pp.481-482

¹⁴⁵ *Ibid.*, p.482

¹⁴⁶ Watson, A. (1996) “Aspects of reception of law” (44), *American Journal of Comparative Law*, American Society of Comparative Law, p.335; Boodman, M. (1991) “The myth of harmonization of laws” (39), *American Journal of Comparative Law*, American Society of Comparative Law, pp.700-701

The English etymology provides that “the earliest sense of harmony arises in relation to music and refers to the combination of musical notes, so as to produce a pleasing effect”. In other words, successful harmony is decided by the impact or result which the combination provides. Harmonization, in this sense, has three elements. First, it assumes the existence of a difference between the objects under consideration. Second, the constituents of harmonization concerned comprise a new and multifaceted “musical sound”. And, third, is that which relates to “consonance”. While some find the sound of harmonized music as pleasurable, others may not¹⁴⁷. While the foregoing elements are initially concerned with harmonization of music, they still, to some extent, correspond to the process in law. Similar to the first element, harmonization of laws presupposes that the laws at stake are divergent in the first place. Second, when a legal system harmonizes its laws with another, this comprises a new and multifaceted set of rules. Third, harmonized laws may or may not be successful when converged. But how can legal harmonization precisely be defined?

Harmonization of laws, according to David, signifies: “Effectuating an understanding about the significance of certain concepts, on certain modes of rule formulation, and on the recognition of authoritative sources”¹⁴⁸. Goldring, on the other hand, explains harmonization as a process where “the effects of a type of transaction in one legal system are brought as close as possible to the effects of similar transactions under the laws of other countries”¹⁴⁹. While the present study intends to consider both definitions, it will focus more on the latter. This is because Goldring’s conception seems to endorse a functionalistic approach to comparative law in the sense of giving attention to the *effects* of the rules.

2.4.2 Do Legal borrowing and legal transplants really exist?

The success of legal borrowing and legal transplants is a debatable matter among comparative law scholars. To Watson, “transplants” exist and are deemed a source of

¹⁴⁷ Boodman (1991), *op.cit.*, p.701

¹⁴⁸ David, R. (1968) “The Methods of Unification” (16), *American Journal of Comparative Law*, American Society of Comparative Law, p.15

¹⁴⁹ See Goldring, (1978) “Unification and Harmonization of the Rules of Law” (9) *Fed. Law Review*, p.284 as cited by Boodman (1991), p.705

utmost importance to the “Western legal tradition”¹⁵⁰. Conversely, Legrand believes that “legal transplant” is not a likely event and thus, comparative lawyers should not waste their time analyzing them¹⁵¹. This is because the meaning of a rule is only “meaningful” to its culture. Hence, a “meaningful ‘legal transplant’ can only occur [...] when both the propositional statement as such and its invested meaning – which jointly constitute the rule – are transported from one culture to another”¹⁵². Therefore, legal transplantation may be worthless if the culture of the country exporting the legal rule was not transferred (alongside the rule itself)¹⁵³.

Moreover, reformers often resort to copying the transplanted law (as it stands) either out of convenience or for actual efficiency purposes. This is similar to the situation where foreign scholars quote others rather than using their own wording. In fact, applying Legrand’s argument in practice may denote that “meaningful” transplants are more or less impossible. Plessis proposes a more realistic formula: “The more foreign the new cultural environment (and especially legal culture), the greater the possibility that a rule will lose its meaning in such a new environment. But where the cultural conditions – and especially legal cultures – are similar, the argument that only a ‘meaningless form of words’ is transplanted, loses force”¹⁵⁴.

In fact, Plessis heavily criticises Legrand’s notion of ‘meaningless form of words’ in the sense that it assumes that law reformers in the importing country always resort to copying the law as it stands. He believes that the similarity of cultures is a matter of “degree” rather than “absolutes”. Hence, if “cultural differences” are substantial, transplantation may not be straightforward. Interestingly, he argues that culture, similar

¹⁵⁰ See Alan Watson’s opinion cited in Schlesinger R. B., Baade H. W., Herzog P. E., and Wise E. M. (1998) “*Comparative Law – Cases, Text, Materials*” 6th Edition, West Publishing Company, pp.13-14, as cited by Plessis (2006), *op.cit.*, p.487

¹⁵¹ In fact, Legrand goes as far as to suggest that “Transplant” implies “displacement”. See Legrand, P. (2001) “What “Legal Transplants”” *Adapting Legal Cultures*, Nelken and Fest (eds.), Hart Publishing, Oxford and Portland, Oregon, p.55

¹⁵² See Legrand, P. (1997) “The Impossibility of “Legal Transplants” (42), *Maastricht Journal of European and Comparative Law*, p.111, in Nelken, D. and Fest, J. (Eds.), (2001), “What “Legal Transplants”?”, *Adapting Legal Cultures*, p.60, as cited by Plessis (2006), p.487

¹⁵³ See Legrand, P. (2001) “What “Legal Transplants”” *Adapting Legal Cultures*, Nelken and Fest (eds.), Hart Publishing, Oxford and Portland, Oregon, pp.60-65, as cited by Plessis (2006), p.487

¹⁵⁴ Plessis (2006), *op.cit.*, pp.487-488

to rules, may be transplanted. This is based on the premise that “culture is not genetic, and can be *learnt*”¹⁵⁵.

2.4.3 Arguments countering transplants and receptions

The notion of transplantation and reception of laws is subject to criticism. For instance, the prospect of transplantation/reception of foreign law encounters a patent challenge by legal positivists. This is premised on the belief that transplants and receptions generally undermine the concerned state’s “sovereign power” by simply responding to the prerequisites of the foreign law in question with no control thereof. Yet this argument may be countered on the grounds that the state may have found that, by transplanting foreign law, it would for instance, accelerate its economic development and will do so by its own will¹⁵⁶. While some transplants proceed merely on the premise that the foreign transplanted law has “proven itself elsewhere” (most probably in the country of origin) and with possibly no aftermath predictions and prospects, some other transplants may be an outcome of well-estimated results¹⁵⁷.

Moreover, it is often argued that transplantation/reception of foreign law may not adhere and correspond to the “mores and culture” of the country considering it. Yet, this argument may be countered on the basis that the culture of a society represents only one of many factors that affect the substance of law¹⁵⁸. Montesquieu is one of the challengers of transplantations and receptions. According to Secondat and Montesquieu, in an event where the rules of one country overlap with another, this may represent no more than “a great coincidence”. Yet, Graziadei believes that Montesquieu’s argument on transplants is not well supported. Particularly, it does not seem to address the drawbacks of transplants, thus, it is merely a “normative” argument rather than it is “descriptive” one¹⁵⁹.

¹⁵⁵ Ibid, pp.488-489

¹⁵⁶ Graziadei (2006), *op.cit.*, p.463

¹⁵⁷ Ibid, pp.463-464

¹⁵⁸ Ibid, p.465

¹⁵⁹ See Secondat, C. D. and Montesquieu, B., D., (1766) “*The Spirit of the Laws*” 4th Edition, Book I, p.7 as cited by Graziadei (2006), *op.cit.*, pp.465-466

However, the early 19th Century's prospects among scholars experienced a drift towards Montesquieu's philosophy, especially the one on the correlation between law and society carried out by Savigny. Yet again these studies were challenged for preventing their readers from looking at the "reality around them". Later on, this led many to fade away from Montesquieu and Savigny's approach. One thought is that the culture of the society would tune itself to the transplanted foreign law¹⁶⁰.

2.4.4 The rationale behind receptions and transplants

Receptions and transplants usually happen for a reason. Graziadei sets out the likely reasons that cause them. First, a foreign law may be imposed forcefully; second, a country may apply/transplant a foreign law for prestigious purposes; and finally, a country may apply/transplant a foreign law for economic development purposes. Pressure and "military expansion by Islamic rulers" had its significant role in diffusing Islamic law in several regions. There are two forms of legal change in this respect: one is temporary and the other is infinite. In case of the former, the nation at stake would have the choice of whether or not to proceed with the foreign law. The latter occurs where the nation is forced to apply the foreign law due to "permanent political or military control of the dominating power"¹⁶¹.

On other occasions, legal change takes place because the country at glance believes that it is prestigious to apply the foreign law in question. Inevitably, this presumes that such country considers the foreign law as "superior". In fact, prestige resembles the first form of legal change "dominance" in the sense that they are both accompanied by "social stratification". The difference, however, between both is that while dominance may not provide an instant complementation to "cultural models" due to the force used, in the case of prestige, such complementation element may be satisfied. Moreover, in contrast

¹⁶⁰ Ibid

¹⁶¹ See Graziadei, M. (2006) "Chapter 13 – Comparative Law as the Study of Transplants and Receptions" *The Oxford Handbook of Comparative Law*, Reimann, M. and Zimmermann, R. (Eds.), Oxford University Press, pp.456-460

On this matter, see also Baxi, U. (2003) "The Colonialist Heritage" *Comparative Legal Studies: Traditions and Transitions*, Legrand, P. and Munday, R. (Eds.), pp.46-48

with the latter, the former is primarily driven by the force of relevant rulers and, as such, may vanish accordingly¹⁶².

Furthermore, as Graziadei stresses, it is indispensable for a research on legal transplants to tackle the correlation between “economic performance” and “legal institutions”. The major controversy in this respect is whether the process of transplantation can enhance economic performance through guiding the transplanting country at stake to introduce “more efficient legal institutions”. Some in fact submit that the process of transplantation often eases or leads to the emergence of “efficient legal institutions”. Indeed levelling the playing field of legal institutions may inherently reduce transaction costs¹⁶³. While it is true that the adoption of economic policies with a view to economic development throughout the 20th Century did not contemplate “institutional settings” on the basis that the market would be capable of correcting itself, following some unsuccessful events, this viewpoint started fading away. In other words, there is now more focus on the institutional settings than was before¹⁶⁴.

2.4.5 The receptivity of foreign law in Egypt: Comparing the past with the future

The success of legal transplants usually rests on receptivity of the law in question in the transplanting state. “Receptivity”, according to Berkowitz, Pistor and Richards, is “the country’s ability to give meaning to the imported law”. According to them, transplantation may appear in two forms: Transplantation due to “occupation” and “voluntary” transplantation. Indeed, this classification is closely related to Graziadei’s rationalizations in the sense that his first ‘imposition of law by force’, on the one hand, is considered as transplantation for the purposes of occupation. On the other hand, Graziadei’s second classification (for prestigious purposes) and third (for development purposes) are classified as voluntary transplantation. Receptivity varies according to the form of transplantation involved¹⁶⁵.

¹⁶² Ibid

¹⁶³ Ibid, p.459; Mattei, U. (1994) “Efficiency in Legal Transplants: An Essay in Comparative Law and Economics” (14), *International Review of Law and Economics*, p.3

¹⁶⁴ Ibid, p.460

Berkowitz, Pistor and Richards argue that when a country is involved with a “voluntary transplant”, this boosts receptivity, especially when that transplanting country formulates “significant adaptation” to the transplanted country of origin’s formal legal order in accordance with its national circumstances. In fact, they believe that “changes in the transplanted rules or legal institutions” denote that the transplanting country is adapting the law to its own legal order. Furthermore, one sign of receptivity is the “familiarity with the legal system” (i.e. legal system of origin) from the part of the transplanting country. According to Berkowitz, Pistor and Richards, “common legal history” between two or more countries may, moreover, produce good receptive transplants with minimal space for justifying adaptations¹⁶⁶.

Nonetheless Montesquieu argues that the laws of each country are closely related to the state’s “type of government, geography and climate as well as religion, history and culture”. Berkowitz, Pistor and Richards, however, counter this argument by suggesting that nowadays this theme has changed. Many countries across the globe have “converged” with Western laws and traditions (whether in terms of constitution, commercial, civil etc.). They stress, however, that such convergence exists only in respect of the “law on the books”. It is inevitable that the practice will vary substantially; possibly depending on the level of development reached by the “legal institutions” concerned by the application of the law¹⁶⁷. Given the foregoing literature, several questions should be raised in relation to the present research. Was the French law receptive in Egypt? If so, how may this compare with the prospect of transplanting EU rules on competition? In other words, does it provide evidence that the reception of the EU rules in Egypt would necessarily be receptive, given that France is part of the EU?

Egypt’s reception of the French Code, on the one hand, is classified under Graziadei’s first rationale: ‘The imposition of law by force’ (or occupational according to Berkowitz, Pistor and Richards). The relationship between the EU and Egypt, on the

¹⁶⁵ Berkowitz, D., Pistor, K. and Richard, J. F. (2003) “The Transplant Effect” (51), *American Journal of Comparative Law*, p.179

¹⁶⁶ Ibid., pp.179-180

¹⁶⁷ Ibid, p.188

other hand, in the event where the latter opts for transplantation of the former's rules may be classified under Graziadei's third rationalisation: 'Reform for the purpose of improving economic development' (or voluntary according to Berkowitz, Pistor and Richards). It may not be surprising, except for Berkowitz, Pistor and Richards, to submit that the reception of French Law in Egypt as of the early 1800s was receptive. In fact, the French influence on the Egyptian Legal System is present until today. For instance, Sanhuri, in his speech before the Senate Committee of Civil Code, indicated that the 1949 Civil Code (which is still nowadays applicable) has a French influence, aside of its Islamic law one. This may indeed imply that Egyptian practitioners, at the time, were able to give meaning to the French Law and transpose it to the following generation.

However, this does *not necessarily* imply that Egypt's transplantation of EU rules on competition will be receptive for two reasons. First, the circumstances are unequivocally different nowadays. The gap pertaining to the level of development among nations has substantially increased. The EU occupies a major part of the developed world, while Egypt is still a developing country. More to the point, given the correlation between monopoly and economics, competition law is the kind of field that requires extensive knowledge on economics (i.e. economic expertise) – an area of expertise that the majority of the developing world seems to lack at this stage. That said, Montesquieu's argument on the inevitable link between law and its culture may not be the only obstacle, if at all, in the field of antitrust. In fact, it is the degree of economic expertise in Egypt (compared with the EU) that lies at the heart of this thesis's dilemma in relation to legal transplantation.

2.5 CONCLUSION

The study of comparative law is helpful to this thesis. This is quite evident from the third part of this chapter on comparative methods. In fact, this part demonstrates that the study pertains to a comparable subject – one that may be *usefully* investigated, at the very least, given the common denominator that the EU and Egypt share: The EMAA. Moreover, the chapter demonstrates the importance of functionalism to the present study. This is particularly the case due to the likely gap between law in theory/books and in practice. Thus, it is vital not to rely merely on study the rules of both systems, but also to explore how they apply in similar circumstances – an aspect which connects with the common denominator factor in comparative studies.

Furthermore, the present study will obtain a balance between similarities and differences rather than focussing on one or the other. This is because employing a functionalistic approach to comparative law inherently requires an investigation of similarities to some extent - given the argument observing that functionalism is primarily based on the *praesumptio similitudinis*. In fact, aside from the study of the influences of EU and Islamic rules on the Egyptian legal treatment of abuse of dominance in general (as will be discussed in chapter four), chapter five will investigate the similarities between the EU's approach to excessive pricing and that of South Africa with the objective of discerning the receptiveness of the former in the latter. Specifically, the outcome of this similarities study will arguably decide the receptiveness of the EU approach of excessive pricing in Egypt at this stage. That said investigating the similarities of legal systems remains as important as the differences.

The success in receptivity of French Law (transplantation classified as *the imposition of law by force*) does not necessarily imply that the transplantation of EU rules (classified as *reform for the purpose of improving economic development*) would be receptive. This is notwithstanding that the latter category of transplantation would be *voluntary* in this case (given the arguable lack of legal transplantation obligation in the EMAA), while the reception of French Law was rather *compulsory* (or of an occupational nature). To conclude, the receptivity of French Law in Egypt is *not* an analogy for receptivity of EU rules on competition in Egypt, since the level of economic development (and in turn legislative development) of the EU surpasses Egypt. Not least, economic expertise plays

a vital role in competition-related dispute settlement. In this sense, the EU's legislative development may have potential institutional settings implications when it comes to transplanting EU rules in Egypt.

CHAPTER 3

THE SIMILARITIES AND DIFFERENCES OF THE ORIGINS AND VALUES OF EU AND EGYPTIAN COMPETITION LAWS

CHAPTER 3

THE SIMILARITIES AND DIFFERENCES OF THE ORIGINS AND VALUES OF EU AND EGYPTIAN COMPETITION LAWS

3.1 INTRODUCTION

The enactment of competition law in the EU has been substantially influenced by the Ordoliberal principles and thought. The Ordoliberal framework emerged in Germany at a time when the market was substantially distorted by the use of economic power and cartels from well-established industries. Inevitably, the existence of social and economic inequality hastened the evolutionary process of the Ordoliberal agenda. However, the EU Commission's increasing desire to employ a more economic-based approach - since the millennium - may raise the debate over the continued influence of the Ordoliberal thought.

The introduction of competition law in Egypt, on the other hand, was arguably influenced by the relevant Islamic law principles ("*Shari'ah*"). Particularly, the fact that monopoly in itself is strictly condemned and prohibited under *Shari'ah* may have triggered the enactment of Egyptian Competition Law. It is imperative to understand the relevant *Shari'ah* principles on monopoly and determine whether they are compatible with the application of Egyptian Competition Law. The aim of this chapter is to investigate the similarities and differences of EU and Egyptian Competition Law origins and values.

The chapter is divided into three core parts. The first part will address the EU Competition Law's Ordoliberal origins and the arguable movement towards a more-economic based approach. The second part will discuss Egyptian Competition Law's Islamic law origins and economic values. It will determine how Egypt values economics and whether or not the recent developments exemplify that it is moving in parallel with the EU or influenced by its approach. The third and final part will evaluate the differences of the EU origins and values with those of Egypt. This evaluation will be carried out in light of the comparative law methods set out in chapter two.

3.2 THE ORIGINS AND VALUES OF EU COMPETITION LAW

3.2.1 Historical background of the evolution of the Freiburg and Austrian Schools: The road to Ordoliberalism and social market economy

The road to Ordoliberal thought evolved through two different eras; the Weimar Republic era during the 1920s and the Nazis era during the 1930s in Germany. The Weimar Republic was established following World War One. However, many Germans were against its adoption on the basis that many of its leaders were to be held responsible for the Wilhelmine Reich's military defeat and consequential losses. This in turn led to the lack of credibility of both its laws and institutional structure. Consequently, the latter was perceived as a "tool of power" rather than a credible "social institution"¹⁶⁸.

In the same vein, the economy was not in its best form; given the abnormal inflation rates that prevailed up to the mid 1920s. The economy then collapsed in spite of some attempts to re-gain stability by the global depression in 1929. The German market was mostly "cartelized". Local companies' preferred to agree among each other rather than to compete and – most likely – be driven out of the market. The cartelization of the market as such was strongly condemned by many German intellectuals. In fact, such form of market distortion forced a rapid change¹⁶⁹.

In 1933, the Nazis succeeded the Weimar Republic. The Nazi era traversed the evolution of the Freiburg School; thanks to the equilibrium of thoughts reached by economist Walter Eucken and lawyers Franz Böhm and Hanns Grossmann-Doerth who thoroughly re-considered the demise of the Weimar era and how to deal with it. They commonly observed that the lack of credibility of the laws and institutional structure led to the collapse of Germany at both the economic and political spheres. They, moreover,

¹⁶⁸ See Felix, D. (1971) "*Walter Rathenau and the Weimar Republic: The Politics of Reparation*" as cited by Gerber, D. J. (1994) "Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe" (42), *American Journal of Comparative Law*, American Society of Comparative Law, p.27

¹⁶⁹ Gerber (1994) *op.cit.*, p.28, see also Levy, H. (1966) "*Industrial Germany: A Study of its Monopoly Organizations and their Control by the State*" 2nd Edition, CUP, Frank Cass and Co. Ltd., London.

found that the major concern was that individual freedoms were substantially impeded by the exploitation of economic power¹⁷⁰.

Given Germany's increasingly cartelized market – even during the post-Second World War era; and whilst the U.S. Government imposed a condition of withdrawal of its military provided the adoption of an “economic policy”, the Freiburg's initiative of the protection of individual freedoms notably shone. Such anti-nazism initiatives were compatible with the U.S.'s pre-requisites of withdrawal¹⁷¹. Americans sought to impose a policy that would decartelize the German economy. In this sense, the objective was to substitute the “Organized Capitalism” which prevailed during the 1920s by a capitalism that is free from misuse of economic power and influence of concerned “interest groups”¹⁷².

Although views of the Freiburg's intellectuals varied when it came to detail, they seemed to overlap from the very broad perspective. This equilibrium of thought was known as “Ordoliberalism”¹⁷³. In this respect, it is worth highlighting some of the imperative approaches that generally prevailed at the time. One of the ideas that were found by economist Alfred Muller-Armack and adhered to thereafter by the German Minister of Economic Affairs, Ludwig Erhard, was that of “Social Market Economy” (‘SME’). Founded in 1947, the SME consists of “economic” and “political orders” that are premised on the precepts of “market economy”. This is accompanied by “institutionalized” “social complements” situated to prevent the likely restrictive

¹⁷⁰ Gerber, D. J. (1994) *op.cit.*, pp.28-30; Giocoli, N. (2009) “Competition versus Property Rights: American Antitrust Law, the Freiburg School, and the Early Years of European Competition Policy” 5(4), *Journal of Competition Law and Economics*, OUP, pp.769-770

¹⁷¹ Gerber, D. J. (1994) *op.cit.*, p.31; for a detailed elaboration on the influence of the U.S. on German market, see Berghahn, V. R. (1986) “*The Americanization of West German Industry 1945-1973*” pp.84-110

¹⁷² Breuer, S. (1996) “*The Social Market Economy: Birth of an Economic Style*” Discussion Paper FS I 96 – 318, available from: (<http://bibliothek.wz-berlin.de/pdf/1996/i96-318.pdf>) accessed 27-05-2010, p.5

¹⁷³ Gerber (1994) *op.cit.*, pp.31-32; Gerber, D. J. (1998) “*Law and Competition in the Twentieth Century Europe: Protecting Prometheus*” OUP, p.236

The terminology of ‘Ordoliberalism’ as such refers to a philosophy that emerged during the 1930s and 1940s through a group of intellectuals at the University of Freiburg, Germany. The crisis experienced throughout the Weimar and Nazi regimes is believed to have been the rationale behind the emergence of such philosophy. See Gormsen, L. L. (2007) “The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC” 3(2), *European Competition Journal*, p.332

impacts of a “free market economy” whilst enriched by a “legislative” mechanism that is capable to combat misuses of economic power¹⁷⁴.

The framework of the SME derived first and foremost from the experience gained from the “industrialization process” in Germany. The objective of the SME was to benefit from the efficiency in the market in a manner that safeguards ‘individual freedom’ that was hindered throughout the Weimar era. Adherers to the SME coincided with the views of Ordoliberals; particularly with regards to the need to adopt an economic policy¹⁷⁵. Another interesting approach was that of Friedrich Von Hayek of the Austrian School. Hayek’s thoughts overlapped with those of Eucken in respect of the need to protect the process of free competition and in relation to the “interdependence of orders” (“*Ordnungen*”), but diverged regarding state intervention. More specifically, Hayek suggested that the government should not intervene in the competitive process based on the assumption that the market would maintain itself; what is also named as “spontaneous order” – an order that need not be formed by a “central authority”¹⁷⁶. This was often known as “pure” or “classical” liberalism¹⁷⁷.

According to Hayek, market competition is construed as a data system that synchronises “dispersed knowledge” through the instrument of prices. Competition in the Hayekian view is deemed as a “discovery procedure”. Barry concisely explains Hayek’s theory: “The market is not merely an allocative device, by which factors are assigned to their most important uses, it is a discovery procedure through which economic agents try out

¹⁷⁴ Breuer (1996), *op.cit.*, p.7

¹⁷⁵ Note that adherence to the Ordoliberals’ SME is now arguably reflected in Article 3(3) TEU following the amendments incorporated by the Treaty of Lisbon in the TEU. Particularly, Article 3(3) provides that the EU shall maintain development through encouraging “a highly competitive social market economy” (among some other aspects). Does this mean, however, that the EU should follow Ordoliberal theories while investigating practices under Article 102 TFEU? In other words, do Ordoliberal ideologies have any constitutional underpinnings (similar to the case of *Shari’ah* principles in relation to Egypt)? This will be investigated later on in the present chapter.

¹⁷⁶ Ahn, S. K. (2003) “Comparative Study on Liberalism of Friedrich Von Hayek and Walter Eucken” Available from: (http://www.soc.nii.ac.jp/jsie/Annual_Conferences/64th_Ritsumeikan/paper/Prof.Ahn_s-paper.pdf) Accessed 22-04-2009, p.4; Streit, M. E. and Wohlgemuth, M. (1997) “The Market Economy and the State – Hayekian and Ordoliberal Conceptions” Diskussionsbeitrag 06-97, available from: (<http://www.dundee.ac.uk/cepmlp/journal/html/vol4/Vol4-19.pdf>) Accessed 19-05-2010, pp.13-15

Note that it is often argued that Hayek’s theory of market intervention as such is strongly influenced by the English tradition of liberalism; most notably, the ‘*laissez-faire*’ of Adam Smith.

¹⁷⁷ Gerber, D. J. (1994) “Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe” (42), *American Journal of Comparative Law*, p.32; Gerber (1998), *op.cit.* p.237

new techniques, experiment with different use of resources and exploit new opportunities”¹⁷⁸. Hence, the difference between Eucken and Hayek is that the former deemed “dispersed knowledge” the key role of market competition; while the latter perceived “power” as the major concern that ought to be tackled (i.e. misuse of economic power whether by individuals, states or interest groups). Thus, Eucken, along with Böhm, aimed at tackling such power in order to secure ‘individual freedom’. He strongly criticised Hayek’s self-corrective approach of the market; claiming that it may undermine the competitive order¹⁷⁹.

3.2.2 Objectives of the Ordoliberal framework

The circumstances during the Weimar and Nazi eras were certainly not ideal neither in terms of economic nor political awareness. It was on this basis that Ordoliberals opted for a new beginning – one that would develop on its former framework. In other words, as Gerber writes, Ordoliberals sought to discourage the previous approaches of society and instead suggest a “third way” that balances between “democracy” and “socialism”¹⁸⁰. More specifically, the Ordoliberal framework seemed to highly prioritize “humanist values” over “efficiency” and other economic considerations. Hence, it would make sense to suggest that Ordoliberals sought to adopt a framework that would generate a liberal awareness of the values of having a “humane” culture that would ensure that individual freedoms are protected from any impediments¹⁸¹.

Furthermore, Ordoliberals gave considerable attention to the function of an economy. They argued in favour of the indispensability of competition to the society and the vital link between economic and political freedoms. In essence, they believe that governmental intervention is not the only risk for distorting individual freedoms. The risk might also mount from other individual powers – a matter which they had experienced throughout the Weimar and Nazis eras¹⁸².

¹⁷⁸ Barry, N. P. (1984) “The ‘Austrian’ Perspective” *What is Political Economy?* Whynes, D. (Eds.), Basil Blackwell, New York, as cited by Ahn, S. K. (2003), *op.cit.*, p.4

¹⁷⁹ Ahn, S. K. (2003), *op.cit.*, pp.3-4

¹⁸⁰ Gerber (1998), *op.cit.*, p.239

¹⁸¹ See Miksch, L. (1950) “Walter Eucken” (4), *Kyklos*, p.279, as cited by Gerber (1998), *op.cit.*, pp.239-240

¹⁸² Gerber (1998), *op.cit.*, p.240

Ordoliberals, further, stressed the importance of achieving “social” aims. According to Eucken, “social security” and “social justice” are contemplated as: “The greatest concerns of our time”. In fact, some believed that social welfare might be improved if the market is free from any interventions on the basis that this latter cause would automatically advance economic development. Ordoliberals such as Eucken and Böhm, on the other hand, took a much more liberal approach to justice than this latter. They argue that for a market to attain justice, it must ensure that the overall society equally participate in the market. In fact, this closely links to their notion of “strong state” whereby all laws and regulations are to be equally followed¹⁸³. Ordoliberals, furthermore, perceived that competition leads to economic development that would in turn maintain “political”, “humanist” and “social justice” considerations. This, however, cannot be accomplished, as they argue, without having an “economic order” to which its core objective is to maintain competition¹⁸⁴.

3.2.3 Understanding the function of economic constitution and competition law within the Ordoliberal framework

The method to tackle the misuse of economic power and protect ‘individual freedom’ and other fundamental rights, to Ordoliberals, is the adoption of an economic constitution that complements political constitution. Such constitution ought to recognize a “competition order” that complies with the rule of law (“*Rechtsstaat*”) through disciplining “private” and “public economic powers”. In fact, it is worth mentioning in this respect that what distinguishes Ordoliberals from the Hayekian approach (as well as the “laissez-faire” of Adam Smith) is that the former declares private economic power as the main risk for distorting ‘individual freedom’, while the latter primarily deems public power as the major peril¹⁸⁵.

¹⁸³ Ibid, p.241; Moschel, W. (1989) “Competition Policy from an Ordo Point of View” Peacock, A. and Willgerodt, H. (Eds.), *German Neo-Liberals and the Social Market Economy*, pp.151-152

It is important to note in this respect that Eucken’s meaning of “social” is “independent” – i.e. a society free of power and monopolies. See Gerber (1998) *op.cit.*, p.241 citing Eucken.

¹⁸⁴ Ibid

¹⁸⁵ Breuer, S. (1996), *op.cit.*, p.9; Gormsen, L. L. (2007) “The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC” 3(2), *European Competition Journal*, p.333

According to Ordoliberals, the effectiveness of an economic constitution very much rests on whether or not the legal system adheres to it in terms of structure of laws and regulations. To put this more into perspective, as Gerber clarifies, “when a political unit chose a transaction economy in its economic constitution, for example, that choice required the development of governmental policies designed to create and maintain that system”. This is what Ordoliberals named as “*Ordnungspolitik*” or an “order-based policy”¹⁸⁶. Eucken formed the notion of *Ordnungspolitik* during the closing phases of the Weimar Republic. Given the substantial degree of market concentration accompanied by the rising role of ‘interest groups’ in the market, Eucken was negative about the success of a competitive order to the extent that he described the role of the government during the mentioned era as a “play ball (spielball)” of interest groups. Thus, Eucken sought for “small but strong government” that would provide least but valuable intervention that is free of any interest groups’ pressures¹⁸⁷.

More specifically, in the context of competition, this process is straightforward. In the event where economic constitution provides for a “transaction economy”, the *Ordnungspolitik* would subsequently requisite the legal system to be shaped accordingly in order to adopt the form of “complete competition”¹⁸⁸. According to Ordoliberals, this would ensure an effective execution of the economic system¹⁸⁹. Nevertheless, attaining the objectives of a transaction economy per se remains conditional to satisfaction of some pre-requisites in relation to the role of the government. More specifically, the *Ordnungspolitik* is not meant to enable the government to intervene or be involved in the economy freely or in a discretionary manner. The role of the government is merely to enforce rules of the economic constitution and its involvement in the economy would strictly be limited to the implementation of these rules¹⁹⁰.

¹⁸⁶ Gerber, D. J. (1994) “Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe” (42), *American Journal of Comparative Law*, p.45; Gerber (1998), *op.cit.* p.246

¹⁸⁷ Ahn, S. K. (2003), *Op.cit.* p.7

¹⁸⁸ According to Ordoliberals, “complete competition” is a term that refers to fierce competition in the market where no player has power to force any other out of the market. See Gerber (1994) *op.cit.*, p.43

¹⁸⁹ Gerber, D. J. (1994) “Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe” (42), *American Journal of Comparative Law*, p.45; Gerber (1998), pp.246-247

¹⁹⁰ Gerber (1994), *op.cit.*, p.46; Gerber (1998), *op.cit.*, p.247; Giocoli, N. (2009) *op.cit.*, pp.770-771

Endeavours pertaining to the initiative to protect the process of competition were under contemplation since the last decade of the 1800s¹⁹¹. However, these attempts eventually collapsed. What followed was cartel legislation during the early 1920s in some of the European countries (including Germany)¹⁹². Yet this legislation focussed more on cartels and the imposition of “administrative controls” rather than the idea of protecting competition in itself¹⁹³. Ordoliberals expressed some reservations in relation to this initiative – not merely because of its focus on cartels but rather due to the conceivable outcome of empowering an “executive branch” to monitor and control cartels; given the likelihood of influencing the power of such branch from ‘interest groups’ at the time¹⁹⁴. This in turn leads to the questions of: what is the conception of competition in Ordoliberal thought? How would competition law operate under such system?

In a comprehensively explained manner, “competition policy [according to Ordoliberals] serves to protect the evolutionary process of competition as such, and to prevent the concentration of private power to the detriment of the competitive and the political processes. Consequently, competition constitutes a value in its own right, which goes well beyond efficiency considerations. In this view, the economic constitution serves, first, to guarantee the basic equality of individuals as economic subjects; second, to back up the private law society by public authority; and third, to protect civil liberties”¹⁹⁵. This signifies that protecting the process of competition is not the ultimate objective of Ordoliberals, but is a process through which one may secure “equality of individuals” and safeguard “civil liberties”¹⁹⁶. Given the rising use of economic power and cartels, as history has shown in the Weimar era, Ordoliberals perceived that competition law would stand as a tool for prevention of the “degeneration of the competitive process”. They believed that the idea of “complete competition”

¹⁹¹ The first serious initiative of a competition law was, more specifically, in Austria during the 1890s. For more detailed historical insights on this matter, see Gerber, D. (1992) “The Origins of European Competition Law in Fin-de-Siecle Vienna” (36), *American Journal of Legal History*, p.405, as cited by Gerber (1994), *op.cit.*, p.50

¹⁹² See Riesenfeld (1960) “The Protection of Competition” Stein and Nicholson (Eds.), *American Enterprise in the Common Market*, p.197, 207-294; Kronstein and Leighton (1946) “Cartel Control – A Record of Failure” (55), *Yale Law Journal*, p.297, as cited by Gerber (1994), *op.cit.*, p.50

¹⁹³ Gerber (1994) *op.cit.*, p.50

¹⁹⁴ Ibid

¹⁹⁵ Sauter, W. (2003) “*Competition Law and Industrial Policy in the EU*” (Oxford, Clarendon Press), p.47, as cited by Gormsen (2007), *op.cit.*, p.333, emphasis added

¹⁹⁶ Gormsen (2007), *op.cit.*, p.333

would set out the precepts that would then be applied by an “independent monopoly office”. In fact, this demonstrates a clear adherence to the idea of *Ordnungspolitik*, as Gerber suggests¹⁹⁷.

The model of ‘complete competition’ as such – besides the application of competition law – would avoid acquiring monopoly powers, eliminate present ones, or, where this is deemed unlikely, maintain some sort of control towards them. According to Ordoliberals, there are two categories of monopoly to which competition law should aim to combat. First, the market power acquired through agreements between competitors i.e. cartels – a position which widely existed during the Weimar era. And second, monopoly power acquired by a “single firm”. While the prohibition of monopoly power through agreements is more or less straightforward to Ordoliberals, prohibiting ‘single firm’ monopoly requires the failure to satisfy a specific standard. According to Ordoliberals, firms which have economic power are required to behave “as if they were subject to competition”, or, in other words, behave ‘as if’ they did not have economic power. As Gerber stresses, the Ordoliberal rationale behind the “as if” standard is twofold. It is to avoid the likely detrimental effects from “private economic power *and* state intervention”¹⁹⁸.

In another interesting model, Nipperdey, while enforcing the German law combating “unfair competition”, considered the importance of comparing “performance competition (*Leistungswettbewerb*)” and “impediment competition (*Behinderungswettbewerb*)” – a comparison which Ordoliberals were aware of its essence to their own model. ‘Performance competition’ is a practice which makes the product “more attractive to consumers”. This may be the case by either enhancing the product itself or by reducing its price. ‘Impediment competition’, on the other hand, is a practice which distorts the ability of competitors to “perform”¹⁹⁹. Ordoliberals believe that ‘performance competition’ represents their ideal competition model where a firm would be capable of profiting from its practice. ‘Impediment competition’, on the

¹⁹⁷ Gerber (1994), *op.cit.*, p.50

¹⁹⁸ Ibid, pp.51-52; Akman, P. (2009) “Searching for the Long-Lost Soul of Article 82 EC” 29(2), *Oxford Journal of Legal Studies*, p.274

¹⁹⁹ Nipperdey, H. C. (1930) “Wettbewerb und Existenzvernichtung” *Kartell-Rundschau* p.128, as cited by Gerber (1994), *op.cit.*, p.53; Akman, P. (2009), *op.cit.*, pp.274-275

opposed hand, would contradict with their competition model by driving competitors out of the market – the form of conduct that should be prohibited. In fact, one may submit that the “as if” standard seeks to prevent such form of conduct²⁰⁰.

3.2.4 The influential role of Ordoliberals in Europe

Having adopted their own principles, the concern of Ordoliberals switched to the question of how to enforce these principles in Europe²⁰¹. Remarkably, the influence of Ordoliberalism was reflected from the process of “European unification”. For instance, the German representative, Walter Hallstein, was the first European Competition Commissioner, aside of being one of the founders of the European Communities. He was initially linked to Ordoliberalism since the 1940s and more or less upheld Eucken’s thoughts. Hallstein’s views on legal matters, in general, were consistent with the Ordoliberal theme²⁰². A further key person closely linked to Ordoliberalism whilst being involved in such process was Hans Von Der Groeben. He was one of the key drafters of the “*Spaak Report*” of 1956. As a draft that constituted the premise of the Treaty of Rome establishing the European Economic Community (EEC), the ‘Spaak Report’ addressed the aspects of cartels and abuse of dominance under a part entitled “monopolies”. Although the ‘Spaak Report’ did not comprise a precise shape of future competition rules, it predicted their general theme²⁰³.

²⁰⁰ Gerber (1994), *op.cit.*, p.53; Akman, P. (2009), *op.cit.*, pp.274-275

²⁰¹ This includes Germany where Ordoliberals significantly influenced its Law against Restraints on Competition (GWB) that was introduced in 1957 after gaining support from the Christian Democratic Union (CDU). For further detail on the inspiration of Ordoliberalism on German Competition Law, see Feldenkirchen, W. (1992) “Competition Policy in Germany” 21(2), *Business and Economic History*, Business History Conference

²⁰² Gerber (1994), *op.cit.*, pp.71; Giocoli, N. (2009) *op.cit.*, p.776

²⁰³ It also provided that these rules shall be applicable in member states and have supremacy over national laws. In addition, it provided that these rules shall be construed by the Commission. The EU court will have the role of building on them by adopting new rules and principles through case law. The latter exemplifies how EU law leans more to common law traditions that value case law – in contrast with civil law traditions like Egypt, which perceives legislation as the main source of law. See Schweitzer, H. (2007) “*Parallels and Differences in the Attitudes towards Single-Firm Conduct: What are the Reasons? – The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art. 82 EC*” EUI Working Paper LAW No. 2007/32, available from: (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093248) accessed 21-7-2010, p.10; Akman, P. (2009) “Searching for the Long-Lost Soul of Article 82 EC” 29(2), *Oxford Journal of Legal Studies*, pp.277-282

The formulation of competition rules of the Treaty of Rome was subject to intense debate among member states. The controversy was primarily confined to two directions; German and French. The former delegation that included Groeben stressed the necessity to adopt a “common market” that is premised on the precepts of “market economy”. The latter’s delegation adopted an approach that leaned towards a higher degree of involvement of member states in the ‘common market’; although they seemed to have upheld the German approach of adopting a “market economy”. The debate that further arose between the two delegations was whether to prohibit both anti-competitive agreements and abuse of dominance under a single provision with a general exemption rule that is applicable to both, or, otherwise prohibit them under separate provisions. While the French delegation favoured the former approach, the German delegation proposed the latter one²⁰⁴.

However, the German approach prevailed and the two prohibitions featured separately under Articles 85 and 86 EEC (now Articles 101 and 102 TFEU). In fact, some argue that these provisions were drafted under Ordoliberal influence since some Ordoliberal figures (as identified above) were among the founders of the European Communities²⁰⁵. The questions that should then be raised for the purposes of this chapter: what is the role of competition in the EU? Does it reflect Ordoliberal views and objectives? Is it any different nowadays since the Treaty of Lisbon (TFEU and the consolidated version of the TEU) came into force in December 2009 than it was in the past?²⁰⁶

Competition was contemplated as a core objective of the EU by virtue of Article 3(1)(g) EC [originally Article 3(f) EEC]. Particularly, it provided: “A system ensuring that competition in the internal market is not distorted”. Article 3(1)(g) as such deemed competition an integral goal of the Community (now Union) to the extent that it was

²⁰⁴ Schweitzer, H. (2007), *op.cit.*, pp.10-13; Akman, P. (2009), *op.cit.*, pp.283-285

²⁰⁵ See Gerber, D. J. (1987) “Law and the Abuse of Economic Power in Europe” (62), *Tulane Law Review*, Tulane University Law School, p.85

²⁰⁶ However, the Ordoliberal influence was not merely confined to the drafting process of the Treaty of Rome, but had also (arguably) extended to the application of Article 102 TFEU on some occasions. This will be explored in greater detail in parts 4.2.1.1 and 4.2.2.1 (chapter four). However, the argument that will develop later on in the present chapter is that the Ordoliberal influence is starting to fade away. This argument will be further reflected in part 4.5.1 (chapter four).

often cited in practice²⁰⁷. Moreover, Article 4(1) EC (now Article 119 TFEU) further stressed the significance of competition by providing that economic policies within the [EU] shall be carried out “in accordance with the principle of an open market economy with free competition”²⁰⁸.

According to Giocoli, the need to protect competition as an objective stipulated under the original Article 3(f) EEC as such reflected the influence of Ordoliberalism on the drafting process of the EEC Treaty²⁰⁹. In contrast with this view, Akman and Kassim seem to argue that since Ordoliberals seek to protect competitors, and particularly, their individual freedoms, rather than the process of competition, the treatment of Competition Policy within the EU is not of Ordoliberal influence. They suggest, instead, that drafters of the EEC Treaty favoured economic efficiency²¹⁰. For instance, the fact that Article 86 EEC (now Article 102 TFEU) does not prohibit the “accumulation of power” (i.e. dominance in itself) but rather the abuse of such position entails that drafters were in favour of “increasing efficiency”²¹¹.

However, the introduction of the Treaty of Lisbon (TFEU) modified the position of competition to the extent that some may doubt on the continued contemplation of competition as one of the objectives of the EU. Particularly, with the persistence of Sarkozy’s French government, Article 3(1)(g) EC was removed from the EU’s new and consolidated Treaties (TFEU and TEU respectively). Arguably, nonetheless, Protocol 27 on the Internal Market and Competition provides a parallel stipulation by stating that:

²⁰⁷ See for instance, Case C-68/94, *French Republic v. Commission*, [1998] E.C.R. I-1375

²⁰⁸ Articles 3(1)(g) and 4(1), Treaty establishing the European Community, Consolidated Text, O.J. C 325 of 24 December 2002

²⁰⁹ Giocoli, N. (2009) *op.cit.*, pp.767-768, 784

²¹⁰ Note that the difference between the Ordoliberals’ *rights-based approach* and the EU Commission’s initiative to move towards a more *economics-based approach* in relation to Article 102 TFEU will be compared in part 3.2.7 of this chapter.

²¹¹ Akman, P. and Kassim, H. (2010) “Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy” 48(1), *Journal of Common Market Studies*, Blackwell Publishing Ltd., pp.126-127

This view will be discussed in part 4.2.1.1 (chapter four).

“THE HIGH CONTRACTING PARTIES,
CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,
HAVING AGREED that:
To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union”²¹².

However, as Jones and Sufrin note, it may still be too early to decide on whether or not the omission of Article 3(1)(g) EC will change the role of competition in the EU. The first impression, nevertheless, is that competition will remain as one of the objective of the EU - even though its role was moved to Protocol 27. This is essentially based on two grounds. First, Protocol 27 still upholds competition as one of the objectives of the EU; given that Article 352 TFEU (ex. 308 EC) indicates that the Union may, if necessary, proceed “to attain one of the *objectives set out in the Treaties*”²¹³. Moreover, Article 51 TEU stipulates that Protocols of EU Treaties: “Shall form an integral part thereof”²¹⁴. This signifies that Protocols and Annexes are equated with Treaty provisions in terms of importance.

Aside from the foregoing, Article 3(3) TEU provides an important characterisation of the internal market. According to Article 3(3), “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, *a highly competitive social market economy*, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment [...]”. This stipulation seems to uphold the Ordoliberalists’ emphasis on SME. Indeed, as noted above, it may still be too soon to decide on how Article 3(3) will be applied and whether or not it will reflect the

²¹² Protocol No. 27 on the Internal Market and Competition, as attached to the Consolidated Versions of the Treaty on European Union and the Treaty on the functioning of the European Union, OJ C 83 of 30.3.2010

²¹³ See Alison, J. and Sufrin, B. (2010) “*EU Competition Law – Texts, Cases, and Materials*” Fourth Edition, OUP, p.40, citing Article 352 TFEU, Treaty on the Functioning of the European Union, emphasis added by Alison and Sufrin

²¹⁴ Article 51, Consolidated Version of the Treaty on European Union, O.J. C 83 of 30.3.2010

philosophy of Ordoliberals²¹⁵. That aside, some, however, doubt on the continued influence of such philosophy since the post-Millennium era.

For instance, Gerber believes that the Ordoliberal themes become more and more “outdated” over time. He argues that these insights initially emerged to combat an “extra-ordinary situation” i.e. the highly cartelized German market during the Weimar era’s predicaments. It is only a minority of new generations who share similar mentalities to those of the first quarter of the last decade in Germany. Thus, addressing and imposing the Ordoliberal discipline to the majority of modern society may be worthless, aside of causing a sense of unfamiliarity among them. This is apart from the increasing lack of confidence and belief in Ordoliberal themes – especially those linking “economic structures” with “human values”²¹⁶.

Moreover, the Ordoliberal thought is beginning to fade away from the “economic reality” of nowadays. In fact, it is only the minority of well-established markets that represent the competition model which Ordoliberals aim to achieve. This is to submit that the idea of “complete competition” is relatively farfetched nowadays. This is in addition to the fact that Ordoliberals assumed that competition would only derive from national competitors and hence, stressed on the observation that “economic power” would lead to detrimental outcomes. Nowadays, it is not as vital to focus on such observation on the basis of likely “international competition”. In the same vein, sceptic views are expressed over the Ordoliberal vision of government intervention. It is nowadays far from hard to believe that laws and regulations are sufficient to prevent the necessity of governmental interventions²¹⁷.

The Commission is nowadays shifting from a *per se* approach in relation to the implementation of Article 102 TFEU to an effects-based approach²¹⁸ – an approach that provides a higher degree of discretion than what Ordoliberals argue in favour of. The

²¹⁵ Article 3(3), Consolidated Version of the Treaty on European Union, O.J. C 83 of 30.3.2010

²¹⁶ Gerber (1994), *op.cit.*, p.75

²¹⁷ Ibid

²¹⁸ The Egyptian system, on the other hand, seems to have taken this initiative (arguably) in relation to its treatment of most of the abusive practices ever since it adopted its competition law in 2005. This will be discussed in detail in part 4.5.2 (chapter four).

per se approach employed by the EU's investigating authorities was criticized by the Economic Advisory Group for Competition Policy ('EAGCP') in 2005. The EAGCP argues in favour of an effects-based approach to Article 102 TFEU²¹⁹. The question that should be raised in this respect: what does an effects-based approach entail? What is the difference between such approach and a rule of reason test? Do the EU and Egyptian approaches vary in this respect?

3.2.5 Conceptualizing European and Egyptian rule of reason²²⁰

At the very outset, it is important to draw a distinction between two forms of legal treatment of practices/agreements. First, where the practice inherently generates anti-competitive effects in manner that need not require further analysis – hence declared “illegal *per se*”. Put differently, these practices are subject to *per se* approach²²¹. And second, where the “competitive effects” of the practice or agreement may not be discerned except through analysis of its effects. Whether the practice is classified under the first or the second form, the objective, as Steindorff writes, is to shape a judgment that outlines the “competitive” consequences of such practice. It is neither to determine whether a “policy” supporting competition is in the “public interest”, nor is it in favour of “members” of the “industry”. In this sense, judgements (and indeed competition authorities' decisions) are not intended to identify whether competition in general is

²¹⁹ The EAGCP is a group of specialists in the field of industrial organisation with particular reference to competition policy. The role of the EAGCP is to consult the Commission through gathering data from well-established academics on the issues which the Commissioner or DG Comp deems vital to competition policy – whether this is commissioned by the latter or not. See Gual, J., Hellwig, M., Perrot, A., Polo, M., Rey, P., Schmidt, K. and Stenbacka, R. (2005), Report by the Economic Advisory Group for Competition Policy, “*An Economic Approach to Article 82*” available from: (http://www.shh.fi/~stenback/eagcp_82_2005_july_21.pdf) accessed 14-06-2008. Note that this report will be discussed in more detail in chapter four of this thesis.

²²⁰ Given that this thesis is limited to abuse of dominance, when it comes to the discussion of rule of reason in relation to agreements restrictive of competition, this part will only investigate the differences in treatment of such notion under EU and Egyptian laws; since this is where the rule of reason debate arises. Thus, this part will not go into much detail as to how these jurisdictions treat agreements restrictive of competition.

²²¹ In *Northern Pacific Railroad Co.*, the Supreme Court stated that: “There are certain agreements or practices which because of their pernicious effects on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without an elaborate inquiry as to the precise harm they have caused or the business excuse for their use”. See *Northern Pacific Railroad Co.*, 356 U.S. 1 (1958), as cited by Lecchi, E. (2008) “Protecting your Network/Complying with EC (and National) Competition Laws – A Leegin for Europe?” 4(1), *Competition Law International*, Journal of the Antitrust Committee of the International Bar Association, [February 2008 issue] p.21

“good” or “bad” for the market – as this is usually the role of policy-makers. The inquiry rather rests at the heart of the competitive effects of the practices at stake²²².

Patently, the present debate is only confined to the second classification. However, such debate is not straightforward. In fact, some seem to confuse between a rule of reason test and a mere effects-based approach (or imply that they are identical notions)²²³ although the two approaches (arguably) vary in terms of process. In general terms, while the former test involves balancing between anti-competitive and pro-competitive effects of the agreement/practice; the latter inquires about whether the practice at stake harms (or is likely to harm) competition and consumer welfare²²⁴, and if so, whether it may be objectively justified²²⁵. This signifies that, unlike a rule of reason test, the practice may not be prohibited not merely because pro-competitive effects outweigh anti-competitive ones; but rather because the incumbent(s) was able to provide an objective justification for its practice.

A further (arguable) difference lies in the burden of proof. In the case of rule of reason, it is up to competition authorities to prove that the practice’s anti-competitive effects outweigh its pro-competitive ones. In relation to objective justification, while the burden of proof tends to lie on the competition authority (or claimant) to initially prove that the incumbent’s practice is anti-competitive, it is up to the latter to provide an objective justification for its practice. Notwithstanding these differences, it should be stressed that the two approaches (generally speaking), on some occasions, are likely to

²²² Steindorff, F. (1984) “Article 85 and the Rule of Reason” (21), *Common Market Law Review*, Martinus Nijhoff Publishers, Dordrecht, Netherlands, pp.640-641

²²³ Particularly, suggesting that Article 8 of Law No. 3/2005 (on abuse of dominance) requires employing a “rule of reason detailed analysis” and implies that it equates to an effects-based approach, see El-Far, M. (2010) “The importance of south-south competition cooperation under the UFM: QIZ case study” (2), *Mediterranean Competition Bulletin*, available from:

(<http://ec.europa.eu/competition/publications/mediterranean/index.html>) accessed 19-11-2010, p.44

²²⁴ Although it should be noted that both interests do not always go hand in hand. However, it is perceived that protecting competition is taken as a means for protecting consumer welfare.

²²⁵ This approach seems to fairly resemble that of Kavanagh, Marshall and Niels who argue that the intended effects-based test “does not mean fully quantifying all the pro- and anti-competitive effects of the conduct in each case and then weighing these against each other”. They rather believe that the test intends to ask some specific questions: “does this conduct foreclose a significant part of the market? Or is it likely to exclude as-efficient competitors and distort competition?” Put differently, the test, according to them, involves “putting forward a plausible theory of harm to competition and consumers”. See Kavanagh, J., Marshall, N. and Niels, G. (2009) “Reform of Article 82 EC – Can the Law and Economics be Reconciled?” Ezrachi, A. (Ed.), *Article 82 EC: Reflections on its Recent Evolution*, Hart Publishing, p.13

reach similar conclusions: the practice at glance may not be prohibited even though it was committed and may have produced some anti-competitive effects. This indeed contrasts with a *per se* approach where the practice is prohibited once detected i.e. no need to investigate effects.

However, it must be stressed that the debate over whether or not rule of reason is (or should be) followed under EU and Egyptian Competition Laws seems to merely be confined to agreements restrictive of competition (i.e. it does not seem to extend to abuse of dominance – as will be discussed below)²²⁶. Nonetheless, it is highly controversial whether Article 101 TFEU – and precisely 101(1) - tolerates a rule of reason approach in the first place. In fact, there exists no unequivocal conceptual underpinning to this approach under EU Competition Law in general. The U.S. Supreme Court, in *National Soc. of Professional Engineers v. U.S.*, referring to *Mitchel v. Reynolds*, suggested that what distinguishes rule of reason in Europe from that in the U.S. is that European Courts are not led by “any legal tradition”, as is the case with respect to the U.S. where such notion “has remained constant”. This is to say, in other words, that understanding rule of reason in Europe is like sailing in “unknown waters”, as Steindorff describes²²⁷. That said, while some argue that investigating authorities employ a rule of reason approach (or should employ) under Article 101(1); others, on the opposed hand, argue that this is not the case.

²²⁶ However, this is in exception to horizontal agreements (agreements between competitors) in Egypt where Articles 6 of Law No. 3/2005 and 10 and 11 of its Executive Regulations do not stipulate any criteria on effects of the agreement which, in turn, implies that they require the investigator to follow a *per se* approach – as Article 12 of the Executive Regulations does in relation to vertical agreements (as will be highlighted below). See for instance, Report of the Egyptian Competition Authority on the *Cement Market*; Judgement of the Egyptian Court of First Instance on Misdemeanours Nasr City (2900/2008) August 25, 2008; Appeal in *East Cairo* (22622/2008). Former Executive Director of the Egyptian Competition Authority also confirmed this understanding. See Attia, K. (2009) “Introducing Competition Law and Policy - The Case of Egypt” (1), *Mediterranean Competition Bulletin*, available from: (http://ec.europa.eu/competition/publications/mediterranean/mcb_1.pdf) pp.15-16.

In contrast with this, however, it will be argued that silence in relation to the approach of some of the abusive practices stipulated under Article 8 of Law No. 3/2005 does not necessarily imply a *per se* prohibition. This will be discussed briefly below in the present part and in further detail in part 4.5.2 (chapter four).

²²⁷ *National Soc. of Professional Engineers v. U.S.*, 435 U.S. 679 (1978), p.688, as cited by Steindorff, F. (1984) “Article 85 and the Rule of Reason” (21), *Common Market Law Review*, Martinus Nijhoff Publishers, Dordrecht, Netherlands, pp.639-640

The Commission, in its White Paper on Modernisation of the rules implementing Articles [101 and 102 of the TFEU]; commenting on the way Article 101 is structured, stated that: “It would in a way mean interpreting Article [101(1)] as incorporating a “rule of reason””²²⁸. It added that “If more systematic use were made under Article [101(1)] of an analysis of the pro and anti-competitive aspects of a restrictive agreement, Article [101(3)] would be cast aside, whereas any such change could be made only through revision of the Treaty. It would at the very least be paradoxical to cast aside Article [101(3)] when that provision in fact contains all the elements of a “rule of reason”²²⁹. This implies that the Commission refuses to employ a rule of reason approach within the context of Article 101(1) TFEU largely because it does not feel the need to do so – given the conceivability that the agreement at stake may be exempted under Article 101(3)²³⁰.

In fact, the Commission’s view (above-mentioned) seems to overlap with the insights of EU Courts. Commenting on the process of weighing anti-competitive and pro-competitive effects, the General Court (‘GC’), in *Metropole and Others v. Commission* – where the agreement’s impact was to disallow market access to other broadcasters - stated that: “[Article 101(3)] would lose much of its effectiveness if such an examination had to be carried out already under [Article 101(1) TFEU]”. It added that the fact that Courts have been “more flexible” in construing Article 101(1) in the past does not in itself entail that they have employed a “rule of reason” approach. On the contrary: It contended that the flexibility in judgments exemplify that decisions are based on an in-depth analysis rather than an abstract one. That said, the GC importantly stated that the Commission: “Was not obliged to weigh the pro and anti-competitive effects of those agreements outside the specific framework of [Article 101(3) TFEU]”.

²²⁸ EU Commission (1999) “White Paper on Modernization of the implementing Articles 85 and 86 of the Treaty” Commission Programme No 99/027, para.56

²²⁹ Ibid, para.57, emphasis added.

²³⁰ Article 101(3) TFEU exempts agreements, decision by associations, or concerted practices that restrict competition within the framework of Article 101(1) if they contribute “to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 (b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question”.

As such, the GC made clear its intention not to consider a rule of reason analysis (defined in pro/anti-competitive effects balancing) under Article 101(1)²³¹.

In a more controversial case, the CoJ in *Wouters v Algemene Raad Van De Nederlandse Orde Van Advocaten* ('Wouters') suggested that not every restriction of the "freedom of action" of one of the parties to the agreement would essentially fall within the ambit of Article 101(1) TFEU and that the whole context of the agreement in question should be taken into consideration. It added that: "Account must be taken of [the agreement's] objectives, which are to be connected with the need to make rules relating to organizations, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience [...] It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives"²³².

The CoJ also stated that the rule at stake would not fall within the scope of Article 101(1) TFEU if it were vital for ensuring that the legal profession is practised properly. That said; it is undisputable that the CoJ took into account the 'legal profession' - a non-competition concern - and balanced it with the restrictiveness of competition – a competition concern - in light of the impact on consumers of legal services. Albeit restrictive of competition, the CoJ gave preference to the 'non-competition concern' to ensure that the legal profession is undertaken in the correct way and in the benefits of consumers²³³. The fact that the CoJ declared Article 101(1) as inapplicable without considering the exemption under Article 101(3) – though the practice was restrictive of competition – raised the controversy over whether or not a rule of reason was employed.

According to Monti, the CoJ in *Wouters* seems to draw on the *Reisburo Broede* case²³⁴ where it was held that a non-discriminatory German rule of legal profession, though fell

²³¹ Case T-112/99, *Metropole Television and Others v. Commission*, ECR II-2459, [2001] 5 CMLR 33, paras.74-78; see also Case T-328/03, *O2 (Germany) v. Commission* [2006] E.C.R. II-1231

²³² Case C-309/99, *Wouters v. Algemene Raad Van De Nederlandse Orde Van Advocaten*, [2002] E.C.R. I-1577, ALL ER (EC) 193, [2002] 4 CMLR 913, para.97, emphasis added

²³³ *Ibid*, para.107

²³⁴ Case C-3/95, *Reisburo Broede*, [1996] E.C.R. I-6511

within the scope of Article 56 TFEU on the freedom of services, was justified by public interest – often named by some as “rule of reason”. This so-called “*European rule of reason*” was applied within the context of Article 101 in *Wouters* where paragraph 1 was declared as inapplicable, notwithstanding the unequivocal restriction on competition. This approach exemplifies that anti-competitive agreements that protect a national “public policy” concern may be used as a tool to evade the restriction under Article 101(1)²³⁵. This signifies that *European rule of reason* denotes balancing between competition and non-competition concerns and, as a result, favouring one over the other depending on which concern outweighs the other; all of which to be made within the context of Article 101(1) TFEU.

The conception of Egyptian rule of reason, on the other hand, seems to be fairly more straightforward. Article 7 of Law No. 3/2005 prohibits anti-competitive vertical agreements (i.e. agreements between a producer and distributor or retailer) based on a “rule of reason” approach²³⁶. Article 12 of the Executive Regulations sets out a four-tiered test as follows:

1. *“The effect of the agreement or contract on the freedom of competition in the market;*
2. *The existence of benefits accrued to the consumer from the agreement or contract;*
3. *The considerations of preserving the quality of the product, its reputation, safety, and security requirements, in a manner that do not harm competition, and;*

²³⁵ Monti, G. (2002) “Article 81 EC and Public Policy” (39), *Common Market Law Review*, Kluwer Law International, pp.1086-1088. For a similar view, see Komninos, A. (2005) “*Non-competition concerns: resolution of conflicts in the integrated Article 81 EC*” University of Oxford Centre for Competition Law and Policy Working Paper (L) 08/05) available from: (<http://www.competition-law.ox.ac.uk/competition/portal.php>) accessed 01-08-2010. For a slightly different but interesting view, see O’Loughlin, R. (2003) “EC Competition Rules and the Free Movement Rules: An Examination of the Parallels and their furtherance by the ECJ *Wouters* Decision” 24(1), *European Competition Law Review*, Sweet and Maxwell, London, pp.62-69.

²³⁶ Attia, K. (2009) “Introducing Competition Law and Policy - The Case of Egypt” (1), *Mediterranean Competition Bulletin*, p.16

4. *The extent of compliance of the conditions of the agreement or the contract with established commercial customs in the activity subject to examination*”²³⁷.

The Egyptian legislator as such seems to have favoured a rule of reason approach to suspected anti-competitive vertical agreements over an exemption mechanism. Particularly, the first two steps of the above test provide the ECA and Courts to weigh the agreement’s anti-competitive effects with its pro-competitive benefits. The third step, in essence, analyses the benefits that may be passed on to consumers; while the fourth step relates to the compatibility of the agreement at stake with commercial customs. The *Egyptian rule of reason* as such seems to somehow *borrow* from the U.S. rule of reason. Particularly, the Egyptian legislator appears to have borrowed Justice Brandeis’s approach in *Board of Trade of City of Chicago v. U.S.* where it was held that anti-competitive and pro-competitive effects should be balanced in pursuit of the ‘net’ competitive effect²³⁸.

The EU system, on the opposed hand, adopts an exemption mechanism. Exemptions are classified under two categories. First, block exemptions, and; second, individual exemptions within the scope of Article 101(3) TFEU. If the vertical agreement in question does not satisfy prerequisites of the (new) 2010 Block Exemption Regulation (‘BER’)²³⁹, it may still have the chance to be exempted individually by virtue of the exceptions provided under Article 101(3) – if it is caught under Article 101(1)²⁴⁰. However, exempting agreements through an exemption mechanism does not mean that investigating authorities do not analyse the effects of vertical agreements. On the contrary, the CoJ, in *Javiso v. Yves St. Laurent* regarding an export ban that was imposed on distributors in both Russia and Ukraine, did not find the agreement as

²³⁷ Article 12, Executive Regulations

²³⁸ See *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918)

²³⁹ For instance, where the market share of each of the parties to the agreement (supplier and buyer) surpasses the 30% threshold of the relevant market, it shall not be automatically exempted within the scope of the BER.

See EU Commission Regulation No. 330/2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, O.J. 2010 L102/1. This regulation came into force in June 2010.

²⁴⁰ EU Commission (2004) Guidelines on the Application of Article 81(3) of the Treaty [2004] O.J. C101/97, para.110

restrictive of competition by object and instead analysed its effects²⁴¹. In *GlaxoSmithKline v. Commission*, the GC, following an analysis of effects, indicated that the indirect export ban at stake did not affect competition²⁴². However, the CoJ, later on, overruled this decision and held that the agreement at stake was restrictive of competition by object and indicated that, in principle, agreements that are aimed at restricting or limiting parallel trade have as their object the prevention of competition²⁴³.

The debate over the approach of analysis of abuse of dominance, on the other hand, *does not* involve rule of reason (or a separate provision for exemption) neither under European nor Egyptian Competition Laws. The controversy rather rests on whether or not an effects-based approach is applicable. Shortly following the EAGCP's consultation paper, or perhaps as a positive response to it, in its Discussion Paper on the Application of Article 82 EC to Exclusionary Abuses ('Discussion Paper'), the EU Commission implied the need for an effects-based approach within the context of Article 102 TFEU – although the latter adopted a much more rigorous approach²⁴⁴. It particularly stated that: "The central concern of Article [102] with regard to exclusionary abuses is thus foreclosure that hinders competition and thereby harms consumers"²⁴⁵. This means that foreclosure and consumer harm lies at the heart of the Commission's priorities within the application of Article 102.

Moreover, the EU Commission, in its Guidance on the Enforcement Priorities in Applying Article 82 EC to Abusive Exclusionary Conduct by Dominant Undertakings ('Guidance'), stressed that its objective is to: "Ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare [...]". Particularly, the Commission appears to contemplate "anti-competitive" foreclosure as analogy for intervention. But what is anti-competitive foreclosure? The Commission indicated that

²⁴¹ See Case C-306/96 *Javiso v. Yves St. Laurent* [1998] E.C.R. I-1983, [1998] 5 CMLR 172

²⁴² Case T-168/01 *GlaxoSmithKline Services Unlimited v. Commission* [2006] E.C.R. II-2969, [2006] 6 CMLR 1623

²⁴³ See Case C-501/06 P *Commission v. GlaxoSmithKline Services Unlimited*, October 2009

²⁴⁴ For instance, it did not exclude the importance of dominance tests; as the EAGCP paper did. Note that this (debate) will be developed in part 4.5.1 (chapter four).

²⁴⁵ See DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, (2005), para.56

it occurs when the exclusion of competitors may enable the incumbent to profitably increase prices in a manner that harms consumers. In this sense, as Jones and Sufrin note, anti-competitive foreclosure is analysed by investigating two factors: first, the exclusion of actual or potential competitors, and; second, the detrimental effects on consumers²⁴⁶.

Furthermore, despite Article 102 TFEU does not contain a third paragraph addressing criteria for exemption on the basis of efficiency, as Article 101 does have [101(3)], this may not exclude the possibility that a dominant firm may defend its practice through an objective justification. However, defending a conduct that is believed to be abusive by investigating authorities is by no means easy. In fact, Advocate-General ('AG') Jacobs in *Syfait* stated that: "The very fact that conduct is characterised as an 'abuse' suggests that a negative conclusion has already been reached". To this end, some would reasonably doubt on whether or not abusive practices are justifiable in the first place. Perhaps a more precise entailment of objective justification, according to O'Donoghue and Padilla, could be that: "Certain types of conduct on the part of a dominant undertaking do not fall within the category of abuse at all"²⁴⁷.

In fact, it is argued that the defence of objective justification lacks clarity and that the case law provides no more than a puzzling perspective of its scope²⁴⁸. The GC, in *Atlantic Container Lines*, indicated that the scope of objective justification is slim and that its aim is merely to: "Enable a dominant undertaking to show not that the practices in question should be permitted because they confer certain advantages, but only that the purpose of those practices is reasonably to protect its commercial interests in the face of action taken by certain third parties and that they do not therefore in fact

²⁴⁶ See Alison, J. and Sufrin, B. (2010) "*EU Competition Law – Texts, Cases, and Materials*" Fourth Edition, OUP, p.373, citing Communication from the Commission, (2008) "Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC to Abusive Exclusionary Conduct by Dominant Undertakings" COM(2008), paras.19-20

Note that part 4.5.1 (chapter four) will further analyse the Commission's initiative of effects-based approach as such and will discern in detail whether it features in EU case law.

²⁴⁷ See Opinion of Advocate-General Jacobs in Case C-53/03, *Synetairismos Farmakopoion Aitolias and Akarnanias (Syfait) and Others v. GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] E.C.R. I-4609, para.53, as cited by O'Donoghue, R. and Padilla, A. J. (2006) "*The Law and Economics of Article 82 EC*" 1st Edition, Hart Publishing, Oxford and Portland, Oregon, pp.227-228

²⁴⁸ Note that the drawbacks of effects-based approach in general (including legal certainty) will be discussed in detail in the following part.

constitute an abuse”. This signifies, according to O’Donoghue and Padilla, that investigating authorities would be concerned with the defensive methods developed by the dominant firm in question. Nonetheless, they argue that the investigator is not only concerned with these methods, but also with the circumstances of the case at stake²⁴⁹.

The Egyptian Competition Law regime, on the other hand, does not seem employ a consistent approach for appraisal of abusive practices stipulated under Article 8 of Law No. 3/2005. While Article 13 of the Executive Regulations provides for an effects-based approach to some abuses, on the one hand, it did not stipulate any terms on effects in relation to other abuses, on the other hand. Arguably, this implies that the Egyptian legislator had left it open for investigating authorities to choose between a *per se* approach or effects-based analysis²⁵⁰ – perhaps depending on the circumstances of the case and conduct. This may also rest on whether or not the practice in question has no other purpose but to restrict competition or that may otherwise be objectively justified.

In this sense, as will be argued in chapter four, the Egyptian approach to abuse of dominance seems to fairly coincide with the EU system; given that the latter does not appear to exclude the likelihood that abusive practices may be objectively justified (although the modernization of Article 102 TFEU still remains in transition at present)²⁵¹. However, whether competition authorities and courts – in general - *should* opt for an effects-based analysis or a *per se* approach in case settling is subject to

²⁴⁹ See Joined Cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line* [2003] E.C.R. II-3275, para.1114, as cited by O’Donoghue, R. and Padilla, A. J. (2006) “*The Law and Economics of Article 82 EC*” 1st Edition, Hart Publishing, Oxford and Portland, Oregon, p.228

Note that part 4.5.1 (chapter four) will discuss in detail the different forms of objective justification developed in the EU case law.

²⁵⁰ This argument indeed contrasts with the background of Egypt as a civil law tradition (as highlighted in the preceding chapter, part 2.4); where legislation plays a substantial role in judgments, as opposed to common law traditions where the focus lies in precedents. For a distinction between the two traditions, see Dainow, J. (1966/1967) “The Civil Law and the Common Law: Some Points of Comparison” (15), *The American Journal of Comparative Law*, pp.420-426; Mattei, U. and Pardolesi, R. (1991) “Law and Economics in Civil Law Countries: A Comparative Approach” (11), *International Review of Law and Economic*.

However, this argument is supported by the *Steel* case where the Egyptian Competition Authority employed an effects-based approach when it was not obliged to do so by virtue of Article 13 of the Executive Regulations. This will be discussed in detail in part 4.5.2 (chapter four).

²⁵¹ It will be particularly argued in chapter four that, in contrast with the EU Commission’s initiative to employ an effects-based approach to Article 102 through soft law (i.e. Discussion Paper and Guidance) and some of its decisional practice (as will be explored in chapter four), EU Courts still show some reluctance to employ such approach. That is why one may characterize the modernization process of Article 102 as ‘in transition’.

debate. While some, including some Ordoliberals, argue that investigating authorities should avoid employing an effects-based approach (and rule of reason test); others argue in favour of such approach.

3.2.6 Arguments for and against rule of reason and effects-based approaches to Competition Law²⁵²

The problems and potential consequences underlying market intervention by governments were given vast attention by constitutional economists Brennan/Buchanan in 1985 and Vanberg in 1994 along with Ordoliberals such as Eucken in 1952. They argue that economic policy should be concerned with adopting and applying a framework of a “rule of law” that involves as less perusal to practices as possible. This argument is based on three major grounds²⁵³. First, that a given rule of law should obtain predictability and legal certainty. Employing rule of reason (and indeed effects-based) analysis would demote such legal certainty. Competition laws should provide market players with the information necessary to enable them to know what is prohibited from what is not. If rules do not provide such systemic information, “efficiency” in a “market economy” may be thereby diminished²⁵⁴. In fact, commenting on legal certainty of the *per se* approach, the Court in *U.S. v. Topco Assocs.*, stated that “without the *per se* rules, business men would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal [...]”²⁵⁵.

Second, according to Ordoliberals and constitutional economists – through experience – removing the “wide discretionary scope” from governmental authorities may reduce the influence of “interest groups” in the decision-making process. While employing a rule of reason may facilitate such influence. Third, Hayek, Heiner and some other scholars assume that the relevant governmental authorities – even if not entitled to the mentioned

²⁵² Although many of these arguments pertain to rule of reason test, most of them may still be applicable to effects-based analysis.

²⁵³ Christiansen, A. and Kerber, W. (2006) “Competition Policy with optimally differentiated rules instead of per se rules vs. rule of reason” 2(2), *Journal of Competition Law and Economics*, OUP, p.219

²⁵⁴ See Voigt, S. and Schmidt, A. (2005) “*Making European Merger Control More Predictable*” Dordrecht: Springer, pp.1-5; Christiansen, A. and Kerber, W. (2006) “Competition Policy with optimally differentiated rules instead of per se rules vs. rule of reason” 2(2), *Journal of Competition Law and Economics*, OUP, p.219

²⁵⁵ See *United States v. Topco Assocs.*, 405 U.S. 596, 609, n.10 (1972), as cited by McChesney, F. S. (2010) “Easterbrook on Errors” (10), *Journal of Competition Law and Economics*, OUP, p.11

discretionary powers – may not have the necessary “knowledge” to rationally resolve matters²⁵⁶. Even more intriguing, as Easterbrook writes²⁵⁷, firms that essentially select the practices *themselves* “may or may not know what is special about [them]. They can describe *what* they do, but the *why* is more difficult. Only someone with a very detailed knowledge of the market process [...] as well as data needed for evaluation would be able to answer that question. Sometimes no one can answer it”. He, moreover, added: “What can be conveyed in the corporate board room is hard to articulate in a trial, when the judge and jury lack economic training and business expertise”²⁵⁸.

This means that, in contrast with firms, the lack of knowledge and economic expertise of Courts – and arguably the ECA – may declare rule of reason and effects-based approaches as formidable and thereby risky. Not only, however, is knowledge the sole problem. The process of discerning the welfare effects of practices often lies “beyond our ken”. The inquiries that these approaches seek to obtain are often farfetched or, as Easterbrook describes, “empty”. In fact, in *U.S. v. Topco Assocs.*, the Court, while favouring a *per se* approach instead of rule of reason on the basis of inability, stated that: “Courts [and arguably the ECA at this stage] are of limited utility in examining difficult economic problems [...] (they are) ill-equipped and ill-suited for such decision-making (and cannot) analyse, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions”²⁵⁹.

One should distinguish between two types of errors that judges (or competition authorities) may commit in antitrust disputes: First, falsely ignoring or not condemning practices that may be anti-competitive (‘type I errors’) – also known as “false negatives” and second, erroneously condemning practices that yield pro-competitive

²⁵⁶ See Brennan, G. and Buchanan, J. M. (1985) “*The Reason of Rules*” CUP, as cited by Christiansen, A. and Kerber, W. (2006) “Competition Policy with optimally differentiated rules instead of *per se* rules vs. rule of reason” 2(2), *Journal of Competition Law and Economics*, OUP, pp.219-220

²⁵⁷ Easterbrook is a member of the Chicago and School of Antitrust and a judge of the U.S. Court of Appeals.

²⁵⁸ Easterbrook, F. H. (1984) “The Limits of Antitrust” 63(1), *Texas Law Review*, pp.5, 8
Interestingly, the first quotation rightly illustrates the Austrian side of Easterbrook (apart from his genuine Chicagoan one), according to McChesney. Particularly, it may arguably imply adherence to the Hayekian School of market intervention (as discussed in detail above). See McChesney, F. S. (2010) “Easterbrook on Errors” (10), *Journal of Competition Law and Economics*, OUP, p.13

²⁵⁹ See *United States v. Topco Assocs.*, 405 U.S. 596, 609, 612 (1972), emphasis added, as cited by Easterbrook, F. H. (1984) “The Limits of Antitrust” 63(1), *Texas Law Review*, p.12

benefits ('type II errors'). This category is also known as "false positives". The question that lies beneath this classification: given the likely inevitability to avoid errors; what type of errors is more favourable (or less costly) over the other? Irrespective of which type is favoured over the other, the decision-maker in question should not disregard the fact that by choosing one type (say type II) the inevitable implication would be that he/she accepts the costs of the other type of errors (type I in this example); no matter how detrimental the effects of these errors are²⁶⁰.

According to Easterbrook, decision-makers should opt for judicial errors that do *not* condemn "questionable practices" - type I errors – essentially based on the premise that: "The economic system corrects monopoly [type I errors – unpunished anti-competitive practices] more readily than it corrects judicial [type II] errors [pro-competitive practices falsely punished]". Put differently, Easterbrook favours excusing practices that may be anti-competitive on the basis that the market will maintain itself in a hastening manner; particularly because the incumbent's high prices may attract competitors/potential entry²⁶¹.

Although he does not seem to endorse the "empty" rule of reason, Easterbrook, similarly, slams the "shrinking" *per se* approach. According to him, this latter approach, despite often used as the correct method (arguably) for countering the dreadful costs of information and litigation, erroneously condemns the "whole" category of practices – whether or not beneficial remains irrelevant to the investigator. This unequivocally signifies that type II errors – falsely condemning pro-competitive practices - are inevitable under a *per se* approach. The "empty" rule of reason (and effects-based approach), nevertheless not the most favourable approach to Easterbrook, seems to comply more with his framework; given the chance that type II errors are more likely to

²⁶⁰ See Whish, R. (2008) "Competition Law" Sixth Edn., OUP, p.190; McChesney, F. S. (2010) "Easterbrook on Errors" (10), *Journal of Competition Law and Economics*, OUP, p.5

²⁶¹ Easterbrook, F. H. (1984) "The Limits of Antitrust" 63(1), *Texas Law Review*, p.15, emphasis added
It should be noted that Easterbrook's justification as such seems to presuppose that the success of excessive pricing is inconceivable. While this complies with the arguments against regulating excessive pricing that will be delineated in chapter four; it contrasts with what is suggested in chapter five that the success of such practice may become plausible since the Egyptian market is highly concentrated ever since the 1991 structural (privatisation) reform - as highlighted in chapter one.

be avoided in this case. The question that should follow is what then are the arguments that are in favour of an effects-based approach?²⁶²

Advocates of an effects-based approach, as opposed to those of a *per se* approach, argue that the “accuracy” which this approach offers may somehow outweigh the potential effects underlying the lack of “legal certainty” of the process. However, this argument is questionable on the basis of two premises provided by Hayek and Heiner. First, although they agree on the idea that a case-by-case analysis may enhance accuracy to the part of a given competition authority - in which case an effects-based approach would be favourable - they argue that such assumption of perfectionism is implausible. In other words, and akin to Easterbrook’s view, competition authorities will likely commit errors in carrying out welfare tests²⁶³. In this sense, one should carry out a comparison between the prototypes of decisions taken under an effects-based approach and those taken under a *per se* approach. Put differently, the comparison should focus on the “rate of errors” committed under each approach. The result of the comparison will – to a large extent – rely on the “fallibility or error-proneness” of the given competition authority on the one hand, and the “fallibility or imperfectness of the rules” on the other hand²⁶⁴.

While proponents of the effects-based approach, on the one hand, argue that the “analytical and statistical” methods used in modern industrial economics are sufficient to enable competition authorities to adeptly reach their decisions, opponent of such approach on the other hand are reluctant of the competency of the decision making process on basis of the high degree sophistication in determining welfare effects – a degree that is beyond human capabilities – as Easterbrook similarly suggests. In fact, Hayek argues that the capability of human beings to validly predict in economics is restricted to “explanations of the principle” aside of “pattern predictions”. More to the point, an effects-based approach – to Hayek - requires discussing and predicting the

²⁶² Ibid, pp.9-10

²⁶³ Vanberg, V. J. (2009) “*Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy*” Freiburg Discussion Papers on Constitutional Economics, available from: (http://walter-eucken-institut.de/publikationen/09_03bw.pdf) accessed 15-10-2009, pp.21-22

²⁶⁴ Ibid, p.22

effects of a given case where a mere explanation of a principle and pattern predictions may be insufficient²⁶⁵.

In fact, the debate over the capability of an effects-based approach to enhance competition authorities' efficiency in taking decisions, as Vanberg writes, is (nowadays) intertwined with two controversies. First, the necessity to resort to economic expertise while enforcing competition rules in specific disputes. And second, the controversy over the need to rely on economic expertise to clarify competition rules that are "too simple"²⁶⁶. With respect to the first issue, it is prudent to suggest that competition law – in many occasions – involves a "complex process of interpretation" of rules, which may require considerable knowledge in economics. In this sense, the advice of economists to competition authorities is worthy. With regards to the second issue, one need not doubt on the indispensability of economics in refining competition-related rules – even from proponents of a *per se* approach. That said, the need to enhance economic expertise whether in the EU or Egypt remains a *must*; should they wish to employ an effects-based approach²⁶⁷.

3.2.7 Economic expertise in the EU Commission: A departure from the Ordoliberal theory of market intervention?

The EU Commission's insights on competition law started taking a different stance about a decade ago. Mario Monti, former EU Commissioner, in one of his closing speeches on what he perceived as one of his central accomplishments, stated that: "A major trend of this mandate has been to ensure that competition policy is fully compatible with economic learning. Furthermore, competition policy is an instrument to foster economic growth, promote a good allocation of resources and to strengthen the competitiveness of European industry for the benefit of the citizens"²⁶⁸. The attention on

²⁶⁵ See *ibid.*, p.23; Hayek, F. A. (1967) "The Theory of Complex Phenomena" Hayek, F. A. (Ed.), *Studies in Philosophy, Politics and Economics*, CUP, pp.22-42

²⁶⁶ Vanberg (2009) "*Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy*" Freiburg Discussion Papers on Constitutional Economics, available from: (http://walter-eucken-institut.de/publikationen/09_03bw.pdf) Accessed 15-10-2009, p.24

²⁶⁷ *Ibid.*, pp.24-25

²⁶⁸ Speech by Commissioner Mario Monti: A reformed competition policy: achievements and challenges for the future, Center for European Reform, Brussels 28 October 2004; Röller, L. H. and Buigues, P. A.

the indispensable correlation between competition law and economics and the necessity of making the former comply with the latter's standards has long been recognised by the Office of the Directorate General for Competition in the Commission ('DG Comp'). Economic models are, hence, given substantial consideration. In fact, former EU Commissioner Neelie Kroes (who succeeded Mario Monti) indicated that economic reforms to the approach to competition law are the Commission's initial priority²⁶⁹.

Current EU Commissioner, Joaquín Almunia, also recognizes the significance of economics within the application EU Competition Law. In a speech entitled "EU Antitrust policy: the road ahead", he stated: "What we can see is a modern approach to antitrust enforcement, which focuses on preventing or putting an end to consumer harm, rather than protecting "competitors" as such". He added that for infringements like abuse of dominance in specific: "A modern approach to competition enforcement means that our investigations must be based on sophisticated economic analysis, but also on a qualitative knowledge of the market realities and on a good understanding of customer demands. This enables the Commission to focus its enforcement efforts to where they matter most",²⁷⁰.

Röller and Buigues interestingly question the justifications behind this path of thinking. They believe that the Commission opted for this approach on the basis of three reasons. First, they argue that the desire to adopt competition-related decisions based on economic rationalizations may be justified by the Lisbon Agenda's stress on "competitiveness" in a manner that may necessitate the investigation of economic gains²⁷¹. Second, the necessity of demonstrating economic evidences from the part of the Commission was raised by the GC. More precisely, in *Airtours v. Commission*, the GC commented on the Commission's report by stating that it was: "Far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment

(2005) "The Office of the Chief Competition Economist at the European Commission" available from: (http://ec.europa.eu/dgs/competition/officechiefecon_ec.pdf) accessed 15-10-2009, p.3.

²⁶⁹ For example, see the Speeches by Commissioner Kroes "Effective Competition Policy – a key Tool for Delivering the Lisbon Strategy", Brussels, 3rd February 2005, and "Building a Competitive Europe – Competition Policy and the Relaunch of the Lisbon Strategy", Milan, 7th February, 2005. It should also be added that the former Directorate-General for Competition, Philip Lowe, is originally an economist.

²⁷⁰ See Speech by EU Commissioner Joaquín Almunia "Antitrust Policy: The road ahead" International Forum on EU Competition Law, SPEECH /10/81, Brussels, 9th March, 2010

²⁷¹ See the earlier discussion on the role of competition post-Lisbon in part 3.2.4 of this chapter.

as to factors fundamental to any assessment of whether a collective dominant position might be created”. The GC then demonstrated the necessity of satisfying three conditions for firms to be considered as collectively dominant – conditions that Röllér and Buigues regard as adhering to an economic approach. And, finally, collaborating with other jurisdictions – most notably the U.S. – may have hastened this process²⁷².

The use of economics in EU competition law may be envisaged in several respects; among which is market definition. The EU system seems to have borrowed the so-called *Small but Significant, Non Transitory Increase in Price Test* (‘SSNIP’) from the US Merger Guidelines. The SSNIP test attempts to answer the question; in the event of an increase in the product’s price by 5-10%, would consumers switch to other products? If so, these products that consumers have switched to are to be included in the relevant product market²⁷³. To approach this question, investigating authorities are patently expected to undertake some empirical research that mostly involves economic²⁷⁴.

In fact, the initiative to employ economists for the purpose of employing an economic-based approach to EU Competition Law existed ever since former EU Commissioner Mario Monti was in office. More specifically, in a conference speech in October 2002, he stated that: “We are increasingly confronted with the need to investigate complex cases, which require in-depth fact-finding and rigorous economic and/or econometric analysis. The [GC] Judgements confirm this need. We are therefore discussing measures aimed at further strengthening the economic expertise capabilities of the Competition DG [...]”²⁷⁵. To this end, a Chief Competition Economist (‘CCE’) was finally appointed

²⁷² See Case T-342/99, *Airtours v. Commission* [2002], as cited by Röllér, L. H. and Buigues, P. A. (2005) “*The Office of the Chief Competition Economist at the European Commission*” available from: (http://ec.europa.eu/dgs/competition/officechiefecon_ec.pdf) accessed 15-10-2009, p.4

²⁷³ The EU Commission (1997) “Notice on the Definition of the Relevant Market” [O.J. 1997 C372/5], para.17; Dhall, V. (2007) “Overview – Key Concepts in Competition Law” *Competition Law Today – Concepts, Issues, and the Law in Practice*, Dhall (Eds.), OUP, pp.1-35

²⁷⁴ The SSNIP test was however, heavily criticised in relation to abuse of dominance disputes. A dominant firm will very likely price its product above the common competitive level. Probably this price is already high from the consumer’s point of view. If the SSNIP test, providing a 5-10% price increase, is to be applied on this firm, it will be realised that consumers will not be able to afford that price and will therefore, shift to other substitutive products. Unquestionably, this plays a role in significantly narrowing the relevant product market and thus, increasing the likelihood of a dominance finding. The U.S. Supreme Court in *Du Pont* has committed this error known as the ‘cellophane fallacy’. See *United States v. E.I. Du Pont de Nemours and Co.* 118 F Supp 41 [D Del 1953]; aff’d 351 US 377 [US Sup Ct 1956]

²⁷⁵ See Speech by Commissioner Mario Monti “EU Competition Policy” Fordham Annual Conference on International Antitrust Law and Policy, New York, 31 October 2002, emphasis added

by the Commission in July 2003 with effect in September, 2003. The office of the CCE, as noted by Röller and Buigues is comprised of approximately ten economists all of which have acquired a PhD in the field of industrial organisation – a specialisation to which an economic approach to competition would inevitably be premised on²⁷⁶.

The roles of the CCE are generally twofold. First, is to contribute with the case team on day-to-day disputes by providing the necessary economic analyses – whether or not detailed depends on the importance of the given dispute - which is named as the “support function”. And second, is to provide the Commissioner and/or the Directorate General with an opinion prior to the closing decision, one which is known as the “check-and-balances” function²⁷⁷. The CCE is also assigned to some other activities. He is in charge of any on-going economic debates. In this sense, collaboration with academics would be deemed necessary. In this respect, the CCE coordinates with the EAGCP – an ideal illustration for that is the consultation report entitled “an economic approach to Article [102]”²⁷⁸.

Some notably argue that the appointment of the CCE reflects a response to the CoJ’s criticisms in *Airtours* (as discussed above)²⁷⁹. In fact, it may be argued that such appointment implies a demise of Ordoliberal influence on the application of EU Competition Law based on some assumptions. Former DG Comp, Philip Lowe, despite once unequivocally admitting the vast influence of Ordoliberalism on EU Competition Law²⁸⁰, suggested that the current and future approach lies at the very heart of consumer welfare and efficiency: “Consumer welfare and efficiency are the new guiding principles of EU competition policy. Whilst the competitive process is important as an instrument, and whilst in many instances the distortion of this process leads to consumer harm, its protection is not an aim in itself. The ultimate aim is the protection of

²⁷⁶ Röller, L. H. and Buigues, P. A. (2005) “*The Office of the Chief Competition Economist at the European Commission*” available from: (http://ec.europa.eu/dgs/competition/officechiefecon_ec.pdf) accessed 15-10-2009, p.6

²⁷⁷ Ibid, pp.6-9

²⁷⁸ Ibid, pp.11-12; see EAGCP Report, cited above.

²⁷⁹ For example, see Evans, D. S. and Grave, C. (2005) “The Changing Role of Economic in Competition Policy Decisions by the European Commission during the Monti Years” 1(1), *Competition Policy International*, p.150

²⁸⁰ See Lowe, P. (2007) “*Consumer Welfare and Efficiency—New Guiding Principles of Competition Policy?*” Speech dated 27 March 2007 at the 13th International Conference on Competition and 14th European Competition Day, p.2

consumer welfare, as an outcome of the competitive process”²⁸¹. This view was also supported by the case law. In *GlaxoSmithKline v. Commission*, the GC stated that: “The objective of the [Union] competition rules is to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer of the products in question [...]”²⁸². Nonetheless, on appeal, the CoJ stressed that the aim is not only to protect the interests of competitors or consumers, but also “the structure of the market and, in so doing, competition as such”²⁸³.

The philosophy that discerns the necessity for intervention within the scope of Article 102 TFEU, as a priority, according to former Commissioner Kroes, is that: “*It is competition, and not competitors, that should be protected. Ultimately, the aim is to avoid consumer harm. Competition on the merits by firms which are dominant should not be discouraged or undermined, even if it may hurt competitors*”²⁸⁴. These guiding principles seem to contrast with Ordoliberal principles. While the latter appears to endorse a “rights-based approach”; as Gormsen names, the former – primarily based on consumer welfare – seems to promote a *consequentialist* or one may recall; effects-based approach.

Put differently, what distinguishes Ordoliberalism from the economic-based approach desired by the Commission is that the former aims to protect individual freedom as a value in itself and not economic efficiency. This latter is rather perceived as a tool for growth and development and not the ultimate aim. If achieved whilst protecting individual freedom, then that is a plus. If not then Ordoliberals will not chase it. The economic-based approach desired by the Commission, on the opposed hand, aims to maximise consumer welfare. Inevitably, this necessitates adopting – at the very least - an effects-based approach to competition law. It, thus, becomes evident that the objectives of both approaches are dissimilar and may at times be incompatible²⁸⁵.

²⁸¹ Ibid.

²⁸² See Case T-168/01 *GlaxoSmithKline Services Unlimited v. Commission* [2006] E.C.R. II-2969, para.118.

²⁸³ See Case C-501/06 P *Commission v. GlaxoSmithKline Services Unlimited*, October 2009, para.63

²⁸⁴ Kroes, N. (2008) “The European Commission’s Enforcement Priorities as regards Exclusionary Abuses of Dominance – Current Thinking” 3(4), *Competition Law International*, Journal of the Antitrust Committee of the International Bar Association, [October 2008 issue], p.5

3.3 THE ORIGINS AND VALUES OF EGYPTIAN COMPETITION LAW

As discussed earlier in chapter one, apart from the external pressures pertaining to the enactment of competition law, the Egyptian government has been keen to follow Islamic principles within the framework of its legal system by virtue of its long-term constitutional provision under Article 2 of its Constitution that contemplates Islamic law as the main source of legislation²⁸⁶. Monopoly, in essence, is unequivocally condemned and well articulated under *Shari'ah*. Despite the absence of direct evidence that it is mandatory for relevant Egyptian Authorities/Courts to follow the *Shari'ah* principles, arguably, Article 2 represents an implicit desire to comply with these principles. Hence, it remains imperative to understand the nature, sources and objectives of *Shari'ah* as well as its principles on monopoly in order to discern the degree of influence of these principles on the Egyptian treatment of abuse of dominance or otherwise the methods to Islamise this treatment.

Is *Shari'ah* merely a religious law? Badr was one of the few scholars who questioned whether *Shari'ah* is a “religious law”. This may be rationalised by the fact that the mainstream of the literature seem to believe that it is merely a religious law primarily because of its name. This is in addition to the fact that Islamic law encompasses “religious” issues that are not addressed by other legal traditions; such as common law. Islamic law is generally divided into two parts; first, “*Ibadat*” and, second, “*Mu'amalat*”. The former part is strictly confined to religious matters (praying, fasting, etc.); while the latter part - in resemblance with other laws - addresses only “transactions” among the society²⁸⁷. Moreover, as Badr writes, the *Quran* – though explicitly addresses some legal matters – may not be contemplated as a “legal code”. In fact it is estimated that only 3% of the *Quran* are legal provisions; nonetheless mostly dealing with family law and inheritance matters. The part on *Mu'amalat* (subject of this thesis) is strictly considered as a “man-made law” with mere reflections on “moral

²⁸⁵ Ibid; Gormsen, L. L. (2007) “The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC” 3(2), *European Competition Journal*, pp.329, 334, 337. Similarly, Gormsen argues that economic freedom and consumer welfare are inconsistent.

²⁸⁶ Article 2 of the Egyptian Constitution stipulates that: “Islam is the religion of the State [...] and the principles of the Islamic *Shari'ah* are the major source of legislation”.

²⁸⁷ Badr, G. M. (1977-1978) “Islamic Law: Its Relation To Other Legal Systems” (26), *American Journal of Comparative Law*, p.188

considerations” and rationalisations behind prohibitions (as extracted from the sources of Islamic law). Hence, contrary to many doubters, Islamic law is not entirely a religious law – it is only the part addressing *Ibadat* that is manifestly divine²⁸⁸.

3.3.1 The sources of Islamic Law

As commonly agreed amongst the Islamic community, there are three source of legislation of Islamic law; first, the “*Quran*”; second, the “*Sunnah*” and; third, the “*Ejtihad*”. The *Quran* is more or less the core source and premise of legislation in Islamic-law countries. It contains some very explicit condemnations and prohibitions. According to the *Quran*, a country and its nationals shall act with reasonable degree of “economic justice” to ensure that transactions are carried out with “fair play” and that no means of “economic exploitation” prevail among the society²⁸⁹. The *Sunnah* may be defined as the acts and statements of the Prophet Mohammed. A written statement of *Sunnah* is called “*hadith*”. The process of approval of each *hadith* is believed to be quite rigid. A series of substantial analysis is carried out in relation to the “content” and “transmission” of each *hadith* in order to discern its “validity” and reliability for future reference²⁹⁰.

Ejtihad, on the other hand, may feature in various forms. Nevertheless there exists only one form that may be relevant to competition law; namely “*Qiyas*”. *Qiyas* is a well-recognized term under *Shari’ah*. It is a process that provides a methodical analogy that reaches an indirect result. Dabbah describes it as a process of “systematic inference or analogy”. For instance, while the *Quran* stresses the importance of “*Zakah*” (i.e. donation) through using *Qiyas*, this may imply that the *Quran* supports charitable people. This may, correspondingly, be applied to the case of economic power and exploitation. Hence, applying the *Qiyas* would declare the Islamic community as liable to prohibit any detrimental economic practices²⁹¹. In fact, Dabbah argues that the only relevant sources to competition law in this regard are the *Quran* and *Ejtihad*. While it is

²⁸⁸ Ibid.

²⁸⁹ Dabbah, M. M. (2007) “*Competition Law and Policy in the Middle East*” CUP, p.22

²⁹⁰ Moghul, U. F. (1999) “Approximating Certainty in Ratiocination: How to Ascertain the *Illah* (Effective Cause) in the Islamic Legal System and How to Determine the *Ratio Decidendi* in the Anglo-American Common Law” (4), *Journal of Islamic Law*, p.136

²⁹¹ Dabbah (2007), *op.cit.*, pp.22-23

true that the acts of the Prophet may not be of much relevance – except for those issues pertaining to price intervention/control – some of his *Ahadith*²⁹² (or statements) remain central to the conception of monopoly under *Shari'ah* (as will be envisaged from the subsequent parts). Hence, the *Sunnah* may be partly an indispensable source that one should not overlook²⁹³.

3.3.2 The objectives of Islamic Law (“*Maqasid Al-Shari'ah*”)

In generic terms, Islamic law aims to yield “benefits” and avoid “harm”. In *Shari'ah*, this is called “*maslahah*”. Linguistically, *maslahah* means “benefit” or “interest”. It may also entail obtaining equilibrium between “private interests” and the broader ambit of “public interests”²⁹⁴. While public interest signifies the aims to attain the objectives of a given set of rules, *maslahah* is the form of such achievement. In fact, the correlation between *maslahah* and competition may be envisaged from an example provided by Hasan with particular reference to the price regulation (“*tas'ir*”). Assume that the Ministry of Trade of a given state issues a regulation that prohibits suppliers from selling food products at high prices and forbids monopolising the market; otherwise they will be subject to a penalty. This regulation as such protects the public from incurring high prices. It attains public interest through limiting inflationary prices and preventing detrimental public harms and as such constitutes a *maslahah* within the meaning of *Shari'ah*²⁹⁵.

A further example illustrated by the Islamic jurisprudence (“*fiqh*”) is that which relates to a sales agreement between a city dweller and a desert dweller. In the ages before Islam, it was more or less a custom for city merchants to move to the borders of the city in order to find desert dwellers and sell them their products. While a city dweller tends to be much more experienced in terms of market prices; a desert dweller is not. Hence, the trend was for city dwellers to exploit the lack of experience of desert dwellers; either

²⁹² “*Ahadith*” is the plural of “*Hadith*”

²⁹³ Ibid, p.21

²⁹⁴ Kamali, M. H. (1998) “Principles of Islamic Jurisprudence” 2nd Edition, Kuala Lumpur: Ilmiah Publishers Sdn. Bhd., p.267, as cited by Hasan, Z. (2008) “*Islamic Perspective on the Competition Law and Policy*” available from: (<http://zulkiflihasan.files.wordpress.com/2008/07/islam-and-competition-policy.pdf>) accessed 20-09-2009, p.5

²⁹⁵ Hasan (2008), *op.cit.*, pp.5-6; Moghul (1999), *op.cit.*, p.139

through buying their goods at substantially low prices or charging them excessive prices. The Prophet and Islamic law stringently condemn this form of conduct as it harms the society of desert dwellers²⁹⁶.

That said; *Maslahah* is an indispensable factor of any ruling under *Shari'ah*. The mainstream of jurists categorise *maslahah* into three major categories: first, the “*daruriyyat*” (“essentials”); second, the “*hajiyyat*” (“complements”) and; third, the “*tahsiniyyat*” (“embellishments”)²⁹⁷. The protection of these categories is of utmost importance and as such, fulfils the objectives of *Shari'ah*. In other words, *maslahah* is the ultimate objective of *Shari'ah*. Consequently, any legal rule that is incompatible with any of the above categories shall not be valid and thus annulled. This means that laws and regulations adopted in Islamic law countries are ought to reflect the objectives of Islamic law. The same also applies to legal rulings in disputes. It should be noted, however, that *daruriyyat* is the only relevant category to this thesis. It is composed of five interests: “*din* (religion), *nafs* (life), *aql* (intellect), *nasl* (progeny), and *mal* (property)”. Particularly, the prohibition of monopoly lies under the last category: *mal* (property)²⁹⁸.

3.3.3 The conception of monopoly under Islamic Law

The relationship between competition law and *Shari'ah* is one that has not been given adequate attention throughout the literature. This is perhaps because it is widely perceived among commentators that competition law could barely be linked with *Shari'ah*. The origin of competition law in Islam may be drawn back to the Seventh Century. Yet the idea of introducing a competition law as such did not prevail among the Islamic Community at the time. It was not until the twentieth century when the initiative of enacting competition law began to emerge from the Western community in a manner that arguably inspired Middle Eastern Countries; particularly those that are

²⁹⁶ See Al-Zuhaili, W. (2002) “*Fiqh Al-Islami Wa Adillatuhu*” Vol. IV, Kuala Lumpur: Dewan Bahasa Dan Pustaka, p.41, as cited by Hasan (2008), *op.cit.*, p.6

²⁹⁷ Moghul (1999), *op.cit.*, p.139

²⁹⁸ Ibid.

trading partners to the EU - like Egypt - to adopt their own law. This rationalizes the lack of literature on this underlying relationship²⁹⁹.

While the concept of monopoly (“*ihṭikar*”) is often contemplated as one of the forms of blocking (“*sadd al-dharai*”) under *Shari’ah*, it may be useful to address the latter’s relevant prohibited practices. “*Sadd al-dharai*” essentially means “unfair competition” posed by one person or more through “blocking”. The analysis of the precept of blocking under *Shari’ah* involves an assessment of the effects of the conduct – including its final outcome. If its effects are harmful, then the conduct is strictly prohibited. If it leads to many benefits, then the conduct becomes rather attractive and would therefore not be prohibited. The precept of *sadd al-dharai*’ may be envisaged from the prohibition of monopolisation (“*ihṭikar*”). The prohibition of monopoly may be seen from the Prophet’s *hadith* entailing that god will upset whoever monopolises. As illustrated by Hasan, in a further *hadith* reported by Al-Tirmidhi, the Prophet urged that: “*Who monopolizes is not but a wrongdoer*”³⁰⁰. But what is *prohibited* monopoly under *Shari’ah*?

As indicated in chapter two, there exists four schools of thought in Islamic jurisprudence; Hanafi, Malikis, Shafi and Hanbali; all of which often reach different opinions and interpretations. The Hanafi School defines “*ihṭikar*” (i.e. monopoly) as a situation where a person withholds food until it gets more expensive and then sells it. The Malikis School believe that *ihṭikar* is monopolising the markets of food, cotton, oil and all other essential products in a manner that prevents the society from gaining possession thereof. The Shafi School defines monopoly as buying grain at periods when its prices are high, withholding it and then selling it at higher prices with the intention to harm others. The Hanbali School states that prohibited monopoly is that which satisfies three conditions: first, a person buys; second, the product bought is grain, and; third, that the person, through buying, causes harm to others³⁰¹.

²⁹⁹ See Dabbah, M. M. (2007) “*Competition Law and Policy in the Middle East*” First Edition, CUP, pp.18-19

³⁰⁰ Zaidan, A. K. (1994) “*Al Wajiz fi Usul Fiqh*” Beirut: Muassasah Risalah, pp.245-247, as cited by Hasan (2008), *op.cit.*, pp.7-8

In this sense, monopoly under *Shari'ah* is composed of two core elements; hold and withhold a commodity. If the person holds a commodity and restrains others from it primarily to satisfy family needs, in theory, this does not form a *prohibited* monopoly under *Shari'ah*. The analogy for prohibition rather appears to be based on holding a commodity for the purposes of trade, and withholding it until its value increases. Sahih Al-Halabi reported a narrative where he asked Abi Abdullah Al-Sadek: “A person who monopolises food [or in other words, withholds its supply]; is this legitimate? He replied: “If the food is plenty and enough to the people; then that is acceptable. If the food is little and not enough to the people; then that it will be condemned to monopolise food and thereby leave people without food [...]”. The imperative question that should then be raised in this respect: does *Shari'ah* prohibit monopoly in food only; or does such prohibition extend to other products/commodities?³⁰²

It is commonly perceived that the prohibition of monopoly under *Shari'ah* is not only restricted food. This is based on some grounds, according to El-Din. Limiting the prohibition of monopoly to food only inevitably means that monopoly in all other essentials (or “*daruriyyat*”); such as medication at periods of life-threatening diseases, heaters at severe weather conditions, etc. is permitted. As such restricting the prohibition to food only i.e. excluding other essentials would stand as strictly a religious prohibition. This contradicts with the objectives of *Shari'ah* (“*maqasid Al-Shari'ah*”) that are primarily based on *generalised* principles such as the principle of “*no-harm*”³⁰³.

Moreover, most *Shari'ah* principles, aside of being general, are applicable to all people, periods and places. In this sense, it would be irrational to assume that such prohibition is restricted to one part or seen from a certain perspective of human life and society. In fact, the rationale behind articulating the prohibition of monopoly through food rests on the ideology that the majority of monopolies at the early stages of Islam were food-related. In addition, and in contrast with many other commodities, food is a commodity

³⁰¹ Zaki, L. H. (2005/2006) “*Qanun Al-Munafsa Wi Manae Al-Ihtikar*” (The Law on the Protection of Competition and the Prohibition of Monopoly), University of the Six of October, [Book in Arabic], pp.35-36

³⁰² EL-Din, M. M. S. (1997) “*Al-Ihtikar fi Al-Shari'ah Al-Islamia*” (Monopoly in Islamic *Shari'ah*), International Institution for Studies and Publication (Beirut, Lebanon) [Book in Arabic], p.35, 93

³⁰³ Ibid, p.132-134

that is used on daily basis; hence monopoly in that market is usually detrimental; especially to the poor or people who earn limited income. Further evidence that *prohibited* monopoly is not merely restricted to food is the statement reported by supporters of Islam (“*daaem Al-Islam*”) from Imam Al-Sadek which mentioned that “*each* monopoly that harms people and increases prices on them is faithless”. The term “monopoly” in this statement is patently generic. Therefore, the prohibition of monopoly extends to all other products and commodities that are essential for living³⁰⁴.

That said, the definition of *prohibited* monopoly that is commonly perceived, according to Zaki, is that which signifies withholding an *essential* product with a view to eventually sell it at a higher price. This definition takes into account the objectives of *Shari’ah* – the prohibition of monopoly in all its forms in order to protect the public from injustice (“*zulm*”) and harm (“*darar*”) to others. The Islamic perspective of monopoly as such contemplates not only the content of monopoly, but also its effects³⁰⁵. In fact, as Zaki writes, there are some situations where modern economics - and indeed many jurisdictions - consider practices as prohibited while *Shari’ah* may not. This is because *Shari’ah* is primarily concerned with the situation where harms and detrimental effects are in fact caused rather than merely likely to be caused³⁰⁶. The definition of monopoly as such exemplifies a fine example of *zulm* – one that is strictly prohibited in *Shari’ah* and indeed contravenes its objectives. In one *hadith*, the Prophet states: “My people, I have prohibited *zulm* to myself, and made it prohibited among you, so please do not engage in *zulm*”. Another *hadith* states: “A monopolist will be disappointed if God decreases prices and will be happy if God increases them”. These statements provide a clear understanding that monopoly is a form of *zulm*, and *zulm* is condemned in Islam and hence, prohibited³⁰⁷.

Furthermore, *Sadd Al-Dharai’* may appear in the form of “hoarding” of a product or property (“*iktinaz*”) – one that in fact many competition laws seem to prohibit. *Iktinaz* in

³⁰⁴ Ibid, pp.130-134, 137

³⁰⁵ Zaki, L. H. (2005/2006) “*Qanun Al-Munafsa Wi Manae Al-Ihtikar*” (The Law on the Protection of Competition and the Prohibition of Monopoly), University of the Six of October, [Book in Arabic], pp.35-36

³⁰⁶ Ibid.

³⁰⁷ Ibid, p.37

essence happens when a person stockpiles many products and declines their supply or distribution in a manner that leads to a shortage in market. The rationale behind this is to deprive the market from the product until the hoarder feels the urge from its seeker who then buys it at an excessive price. This is clearly a prohibited and undesirable conduct under Islamic law³⁰⁸. In the *hadith* reported by *Ibnu Majah*, the Prophet said: “*He is a criminal who hoards grain to sell it at higher price*”. In another *hadith* he mentioned: “*Who also keeps back grain from sale for forty days only to sell it at higher prices ... is not aware of the existence of God or that God has cut himself off from him*”³⁰⁹. The precepts of *Sadd Al-Dharai’* as such constitute the foremost rationalisation of the enactment of competition law – given that its application would reduce harm in the society. This patently links and indeed complies with the objectives of *Shari’ah*. In fact, as Hasan writes, the conception of *Sadd Al-Dharai’* corresponds to the common expression of “*prevention is better than cure*”³¹⁰.

3.3.4 Market intervention/price control under Islamic Law

The debate over the degree of government intervention on the market emerged in the literature on Islamic law and economics during the 1950s. Yet prices of products in the market were verified as early as the pre-Islamic era, since the start of the indirect exchange. Although the *Shari’ah* more or less approved such setting, it sought to incorporate some changes and adjustments in a manner that would comply with the *Shari’ah’s* precepts and standards. In fact, the Prophet already discussed the issue of market imperfections on many occasions. Jurists or the *fiqh*, on the other hand, took care of the adoption of the precepts of price regulation in light of these discussions. The precepts laid down by the jurists were more or less premised on two aspects³¹¹.

First, the *hadith* reported by Anas, which narrated that: “One person came to the Prophet and requested him to fix prices in the market but he refused. Another man came and made the same request; the Prophet said it is *Allah* [God] who pushes prices up or down, I do not want to face him with a burden of injustice”. Second, the report on

³⁰⁸ Hasan (2008), *op.cit.*, p.8

³⁰⁹ Hakim, A. and Syaibah, I. A. (1995) “*Fiqh Sunnah*” (3), Beirut: Dar Fikr, p.119, as cited by Hasan (2008), *op.cit.*, p.8

³¹⁰ Hasan (2008), *op.cit.*, p.9

³¹¹ Bashar, M. L. A. (1997) “Price Control in an Islamic Economy” (9), *Islamic Economics*, p.31

market intervention adopted by Caliph Umar, as reported by Imam Malik on the following story: “Umar bin Khattab passed by Hatib bin Balta’ah who was selling dried grapes in the market. Umar told him either to raise the price or leave the market”. Yet, a different report by Dawud Bin Saleh, as reported by Imam Shafi’i, was put in place. It mentioned that Umar Bin Khattab, after re-considering the matter, told Hatib: “That whatever I told you was neither an expert’s opinion nor a verdict. It was only a personal concern for welfare of people. So, you can sell it at whatever rate you like and wherever you like”. However, Imam Shafi’i declared that his narration was not contrary to that reported Imam Malik; it was just that the latter’s did not provide the full story³¹².

More to the point, the Islamic Jurisprudence carefully contemplated the controversy over the legitimacy of price control. Proponents of the Shafi’i and Hanbali schools challenge the ideology of controlling prices in markets on the basis that richness or poorness is rather a “divine phenomena”. Hence, in the event where the price of a product rises due to “natural causes”, it would do “injustice” from an authority to intervene in the market and fix sellers’ prices. Jurists of the Maliki and Hanafi schools, in contrast, argue that there is nothing that should restrict market intervention. In addition, they suggest that such intervention does not always constitute an “injustice” practice³¹³.

The Hanbali Jurist, Imam Shamsuddeen Ibn Qudamah al-Maqdisi, on the opposed hand, believes that the government is not entitled to intervene in market’s prices on the basis of a *hadith* reported by Anas. He argues that, in accordance with the *hadith*, though encountered many pressures from the public, the Prophet did not, as a matter of fact, ask sellers to change their prices; otherwise it would have been legal to do so. On the contrary, the Prophet assured the public that “price control” is equivalent to “injustice” (“*zulm*”). And “injustice” is inherently “forbidden” by the *Shari’ah*³¹⁴. In a similar vein, Al-Maqdisi believes that the ideology of price control generates several detrimental consequences on the society; such as the increase in prices, the decrease in imports; all

³¹² Dawud, S. A. (ND.) “*Kitabul Buyu’, Babul Tas’ir*”, as cited by Bashar, M. L. A. (1997) “Price Control in an Islamic Economy” (9), *Islamic Economics*, p.31, emphasis added

³¹³ Bashar, M. L. A. (1997) “Price Control in an Islamic Economy” (9), *Islamic Economics*, pp.31-32

³¹⁴ Al-Maqdisi, I. Q. (1374), “*Al-Sharh Al-Kabir*”, Printed on the Margin of al Mughni by Ibn Qudamah, Egypt, Matba’a al Mansur, Vol. 4, p.44, as cited by Bashar (1997), *op.cit.*, p.32

of which leads to “hoarding” and puts a lot of burden on the society. In fact, he argues by virtue of some economic analysis that price control may lead to “black marketeering” in the case of shortage in supply of a particular product; apart from the consequence that consumer needs may not be entirely fulfilled³¹⁵.

However, according to Bashar, Al-Maqdisi’s reference to the *hadith* as such addresses only one circumstance in particular: when grain was imported to the Medina during a period of scarcity; which meant that prices of grain were already high elsewhere. Thus, the declination from the part of the Prophet to control price in this case made sense. What if prices elsewhere were low; while those in Medina were high due to “hoarding”? Would state intervention be justified? According to Imam Ibn Taimiyah, the Prophet on the basis of “injustice” inherently prohibits “hoarding”. This is because a “hoarder” purchases scarce grain with a view to selling it at a later stage at inflated prices. In an event as such, the hoarder is forced by the state to sell his product according to “market price”. This is indeed the view of most jurists. In fact, Ibn Taimiyah claims that in events where, for instance, the seller prevents the trader from “Undue profiteering”, state intervention would not merely be allowed; but would become rather compulsory. In his conclusion, he writes that: “When people’s needs and necessities cannot be safeguarded without a fair price control, then a price control based on justice will be implemented for them - no more, no less”³¹⁶.

Similar to the Malikis approach, proponents of Imam Abu Hanifa of the Hanafi School believe that state intervention in respect of prices should not be permissible unless otherwise detrimental to the interests of the society. The *Hedaya* provides the position of Hanafi as follows: “The Sultan has no right to fix prices for people. (Because) the Prophet said *Allah* is the price-giver... also because declaration of price is the right of the seller [...] so the Imam should not interfere except in a condition where welfare of the people demands it [...]”. With regards to “hoarding”, the judge (“*qadi*”) “will order the hoarder to sell what is in excess of his needs that will usually be assessed in a

³¹⁵ Al-Maqdisi, I. Q. (1374), *Al-Sharh al kabir*, Printed on the Margin of al Mughni by Ibn Qudamah, Egypt, Matba’a al Mansur, Vol. 4, pp.44-45, as cited by Bashar (1997), *op.cit.*, p.32

³¹⁶ Ibn Taimiyah, T.A. (1976) “*Al-Hisba fil Islam*” Dar al-Sha’b, Cairo, pp.14-15, 37, as cited by Bashar (1997), *op.cit.*, p.33

generous manner. The *qadi* will warn him to refrain from that act. If he is caught again for the same offence, he will be imprisoned, and punished in a way deemed necessary to prevent him from wrongdoing and save the public from harm”. In an event where the trader or seller is persistent to sell at higher prices and the “*qadi* has no other means of safeguarding people’s welfare except by controlling prices, then he can do so by consulting wise councillors”³¹⁷

In any event, however, market intervention/price control under Islamic law shall be guided by two core principles: First, the principle of *no-harm* and, second, the principle of *maslahah*³¹⁸. The principle of *no-harm* signifies that: “No action whatsoever, deliberate or unintentional, will be used to cause *harm* on oneself, another person or the society”³¹⁹. The principle of ‘no harm’ as such may have an imperative implication in relation to the application of competition law in Islamic law countries. It implies that governments – and more precisely competition authorities - shall not intervene in the market or control prices *unless* harm is inflicted on the society by virtue of prevailing market prices. This in turn means that *Shari’ah* does not seem to endorse the deployment of a *per se* approach to the application of competition law. It appears to rather require competition authorities and courts to carry out an analysis of effects of the practices at stake (in this respect, pricing) on the society; a patent effects-based approach within the framework delineated earlier.

The above implication is premised on the assumption that the principle of *no-harm* primarily derives from the *hadith* where the Prophet stated: “*No harm and no inflicting of harm*”. To understand this *hadith*, one should divide it into two parts: First, “*no harm*” and, second, “*no inflicting of harm*”. While the former means that one should neither harm him nor *others*; the latter entails that one should accept the harms inflicted on him by another person and should not attempt to harm this latter in response. This

³¹⁷ Marghinani, (ND.) “*Hedaya*” (4), *Babul Karahiyah*, as cited by Bashar (1997), *op.cit.*, pp.33-34

³¹⁸ Note that the two principles will be taken into account while investigating the Islamicity of the lack of excessive pricing and below-cost margin squeeze prohibitions and the price control mechanism granted to the state (Articles 10 and 19 of Law No. 3/2005 and its Executive Regulations respectively). These discussions will particularly feature in parts 4.3.3.2 and 4.4.4 (chapter four) and part 5.2.1 (chapter five) respectively.

³¹⁹ Bashar (1997), *op.cit.*, p.41

Note that Bashar uses the terminology of “no-injury” instead of ‘no-harm’ (as used in this thesis).

thesis, however, is only concerned with the first part of the *hadith*; and particularly harm caused to *others* only. More to the point, the meaning of *no-harm* within the context of monopoly and price control is that governments should not prohibit monopoly; or otherwise any pricing practices unless there is *actual* harm on the society thereby³²⁰. In fact, this implication is supported by the inquiry asked by Sahih Al-Halabi regarding the legitimacy of monopoly in food (as mentioned earlier); where Abi Abdullah Al-Sadek answered: “If the food is plenty and enough to the people; then that [monopoly] is acceptable. If the food is little and not enough to the people; then that it will be condemned to monopolise food and thereby leave people without food [...]”³²¹.

The principle of *maslahah* - as one of the main objectives of *Shari’ah* - as described by Bashar (in this particular aspect), is one that provides that “when a situation arises where procuring one interest implies the loss of another, then greater interest should be pursued in preference to the lesser. With regard to loss or injury reverse will apply, i.e. the greater will be avoided by tolerating the lesser. In this sense, *maslahah* is about securing greater interest”. It is indeed understood that the aims of *Shari’ah* are initially directed towards avoiding and/or eliminating any harm. In the event where injury is inevitable, the principle of *maslahah* shall be enforced in a manner which balances the possible consequences of price control with those of the injury and opt for whichever provides lesser harm³²².

3.3.5 The evolution of economic expertise in Egypt

The ECA, arguably inspired by the EU Commission’s initiative, is in the process of attaining economic expertise. By accessing its website, it was found that the ECA is currently looking to appoint two economists – one of whom to act as a senior. In fact, in the first line of its advertisement, the authority mentioned that it is seeking to employ economists with a view to deploying economic analysis in disputes. Particularly,

³²⁰ In this sense, if an abusive practice is merely *likely* to cause harm to the society, it does not suffice for market intervention. To this end, it is argued that for the purpose of Islamising the treatment of abuse practices, the ECA (and courts) should not prohibit abusive practices unless they cause *actual* harm to the society (effects-based approach).

³²¹ EL-Din, M. M. S. (1997) “*Al-Ihtikar fi Al-Shari’ah Al-Islamia*” (Monopoly in Islamic *Shari’ah*), International Institution for Studies and Publication (Beirut, Lebanon) [Book in Arabic], p.93, emphasis added

³²² Bashar (1997), *op.cit.*, p.41

according to the ECA, “We are looking for dynamic and motivated economists to carry out economic analysis in multidisciplinary inquiry teams”. The advertised positions are for a “senior economist” and an “economist” (who presumably will assist the former and the rest of the presently employed team)³²³.

For eligibility as “senior economist”, among other pre-requisites, the ECA seeks candidates who hold PhD in Economics; and particularly in antitrust and competition policy, industrial organization or regulatory economics with good knowledge of standard applied quantitative methods, in particular with regards to statistics/econometrics. The ECA as such seems to follow the EU Commission’s approach in appointing an economics specialist – especially given the fact that it requires the candidate to hold a Ph.D. in fields like industrial organisation. The qualifications of the candidate economist seem to correspond to those of the CCE³²⁴.

Apart from seeking economic expertise in competition law from the part of the ECA, the Egyptian government in general is moving towards increasing economic expertise and awareness in the practice of competition law (among other fields of practice). For the first time, it opted to introduce a law that establishes courts exclusively dedicated to settling disputes of economic nature. The course of introducing a law as such remains an outcome of considerable debate whether within the business or judicial community³²⁵. The pressures which the Egyptian government has encountered through criticism from the investors community on the present bureaucratic process of commercial litigation in terms of its slow speed of settling disputes and the deficiency of specialisation of judges has been substantial but arguably, of a positive impact. More to the point the debate has experienced many doubts as to whether or not the introduction of economic courts would certainly enhance the commercial dispute settlement process in general³²⁶.

³²³ See Website of the Egyptian Competition Authority, “Careers and Recruitments”, available from: (<http://www.eca.org.eg/EgyptianCompetitionAuthority/Static/Careers.aspx?MainNav=AboutandSubNav=Careers>) accessed 20-10-2009

³²⁴ Ibid.

³²⁵ Egypt Legal Update (2008) “*The Economic Courts Law – What are they, what effect will they have on business?*” July issue, Nile Research and Training, p.7

³²⁶ Ibid

In May 2008, the Egyptian Parliament agreed to introduce the Law No. 120 of 2008 issuing the Law establishing Economic Courts ('Law No. 120/2008'). Article 2 of Law No. 120/2008 requires ordinary courts to automatically refer the disputes at stake to economic courts. The disputes which will be referred to economic courts must be those of economic nature which are listed in particular therein Law No. 120/2008³²⁷. Competition law is one of the fields that fall within the ambit of these courts' competences³²⁸. Article 4 provides that: "First instance and appeal degrees in economic courts have the exclusivity in settling disputes which contravene the terms of ... 14- the Law on the Protection of Competition and the Prevention of Monopolistic Practices"³²⁹.

An imperative advantage of the Law No. 120/2008 is the fact that Articles 8 and 9 entitle economic courts to obtain advice from experts in competition law whenever it finds the necessity to do so. These experts may be from the academic or any other community, as long as they are University graduates³³⁰. Distinctly rephrased, expertise in this respect does not have to derive from government employees. This is a unique feature that has never existed in any other law in Egypt. The Egyptian regime usually relies on experts appointed by the Ministry of Justice. Whilst reliance on the latter has proven to be useful in many disputes, their expertise in competition law may be limited due to the generic experience in civil and commercial law matters they tend to hold. Indeed, this is what distinguishes Law No. 120/2008 from any other³³¹.

The Law No. 120/2008 as such clearly is a remarkable advancement towards increasing economic expertise in the field of competition law in Egypt. It complements the desired

³²⁷ Article 2, Law No.120 of 2008 issuing the Law establishing Economic Courts, Official Gazette, Volume 21(subsequent), 22nd May, 2008

Note that this law came into force on October 1st 2008.

³²⁸ Other fields which fall within the scope of economic courts pursuant to Article 4 include: Company Law, Capital Market Law, Investment Law, Financial Leasing Law, Mortgage Finance Law, Intellectual Property Protection Law, Banking Law, Investment Companies Law, protection from Bankruptcy provisions in the Code of Commerce, Investor Protection Law Communication Regulation Law, Insurance Supervision, Securities Depository, Antidumping Laws and Electronic Signature Law.

³²⁹ Article 4, Law establishing Economic Courts, Official Gazette, Volume 21(subsequent), 22nd May, 2008

³³⁰ On 20th August, 2008, the Minister of Justice has issued the Ministerial Decree 6928/2008 which sets out the rules on the registration of Experts of the Law establishing Economic Courts.

³³¹ See Articles 8 and 9, Law Establishing Economic Courts, Official Gazette, Volume 21(subsequent), 22nd May, 2008. For a discussion on the reliance of experts in disputes in Egypt, see Egypt Legal Update (2008) "*Composition and Fast Track Procedures*" July issue, Nile Research and Training, p.9

expertise of the ECA. In fact, it ensures that the modern economic approach of competition law might not only be reflected from ECA decisions, but also through final court decisions. Moreover, the initiative of having a group of judges who specialise solely in competition law matters – among other related fields - will certainly increase economic expertise in Egypt. However, the aftermath of such law will not in any way be instantaneous. Judges of the economic court will need some time to gain the necessary experience in economic analysis in competition-related disputes; especially given that it is a new field in Egypt.

3.4 INVESTIGATING THE SIMILARITIES AND DIFFERENCES OF THE ORIGINS AND VALUES OF EU AND EGYPTIAN COMPETITION LAWS

The similarities and differences of the Ordoliberal and *Shari'ah* origins of EU and Egyptian Competition Laws may be demonstrated in relation to five issues: First, the justifications behind the emergence of each origin; second, the objectives and rationale behind protecting competition; third, the degree of market intervention; fourth, the degree of influence of each origin on the enactment of competition law, and; fifth but not least, whether or not the legal systems at stake are obliged to follow their origins in relation to the application of competition law.

At the outset, it is vital to note the general difference between Ordoliberalism and *Shari'ah*. Ordoliberalism is not in fact a law. It is merely an approach that arguably influenced the process of enacting a law. *Shari'ah*, on the other hand, is indeed a law. Yet – as some commentators argue – *Shari'ah* is merely a religious law that may not be considered as an ordinary law, since it addresses divine matters and is not in fact codified. Nevertheless, as Badr argues, *Shari'ah* should not be contemplated as such and hence should be treated as any other ordinary law. In this sense, the present evaluation of similarities and differences involves two subjects that are at different levels (*political thought vs. law*).

Although the Ordoliberal theory and *Shari'ah* both evolved at periods when markets were experiencing anti-competitive behaviours – the former during the Weimar Republic and Nazi eras and the latter when the ignorance of desert dwellers was

exploited by city dwellers - the justification behind their emergence is different. Ordoliberal thought, as Gerber argues, evolved for the very purpose of imposing a new beginning in Germany following the disastrous eras. It hence emerged with the aim of changing a particular situation. More specifically, its evolution was aimed at making the public give substantial attention and value to individual freedoms through protection of the process of competition from economic power, cartels and market intervention. *Shari'ah*, on the other hand, did not emerge merely to resolve a particular situation; otherwise it would have solely addressed the issue of exploitation. It rather emerged to send a divine message that discerns what is prohibited or condemned from what is desired in day-to-day life.

Economist Alfred Muller-Armack opted for an SME – one that would ensure that growth from the market is equally distributed among the society. This raises the question of whether or not the notion of SME coincides with the concept of *maslahah* developed in *Shari'ah*. As is understood, the concept of *maslahah* aims to attain equilibrium between private and public interests; and, in the event where this is inconceivable, priority would be given to the latter. In this sense, public interest in *Shari'ah* remains the core objective. The ideology of an SME, on the other hand, is to routinely attain public interest through equal distribution of market growth.

In fact, the Ordoliberal and *Shari'ah's* notions of fairness provide a sound correspondence to the above-mentioned. The objective of the former's approach is to protect the freedom of competition for 'humanist values' and to achieve 'social security' and 'social justice'. To Ordoliberals, justice in itself would not be accomplished unless it is ensured that the overall society equally participates in the market. Under *Shari'ah*, on the other hand, 'injustice' (or *zulm*) is strictly condemned and prohibited. More to the point, the competitive process seems to be protected from monopolistic conducts under *Shari'ah* for the ultimate objective of protecting people from injustice and harms. In this sense, one may write that the rationale and objectives of the protection of competition under both approaches overlap³³².

³³² While the objectives and rationale behind the protection of competition to Ordoliberals and *Shari'ah* per se coincide, this adds to the adherence and fulfilment of *tertium comparationis*.

As for market intervention, the narrowest model was that of Hayek of the Austrian School who argues that interventions in the competitive process should not be enabled on the basis that the market will maintain itself in the event of any distortions; namely the principle of ‘pure liberalism’. While this model seems to coincide with the Shafi and Hanbali’s views of Islamic jurisprudence on price control in the sense that they collectively argue against market intervention, one should stress that this vision does not represent the prevalent model in *Shari’ah*. Government intervention under *Shari’ah* is rather guided by the two principles of *no-harm* and *maslahah*.

If the pricing structure of a firm (assumedly high price) harms the society, then market intervention becomes inevitable. Ordoliberals, on the other hand, focus on protecting humanist values in themselves. Hence, the protection of consumer welfare, unlike *Shari’ah*, comprises not more than an indirect objective. Apart from the difference between Ordoliberalism and *Shari’ah* in terms of whether or not intervention should be permitted, the reasons that justify non-intervention seem to vary. Ordoliberals often argue that empowering the government to intervene may lead to market distortion on the basis that the government may be influenced by well-established market players (or ‘interest groups’) – a justification that is not merely premised on fairness considerations. The *Shari’ah*, on the other hand, seems to stress more on the maintenance of justice and equality and would hence – if at all – prevent market intervention solely for fairness rationalizations³³³.

Ordoliberals have had a vast influence on the introduction of competition law in Europe. The initial objective was to protect the competitive process through the adoption of a competition law (as part of economic constitution) and to enforce an SME in Germany to tackle the tough economic condition. However, such initiative patently extended to the process of European unification. For instance, Hans Von Der Groeden was one of the major drafters of the ‘Spaak Report’ to which the Treaty of Rome was based on. It should be emphasised, however, that EU Commission and Courts are not obliged to follow the Ordoliberal theories in relation to the implementation of competition law. As explored earlier in the chapter, there does not seem to be any

³³³ Another likely justification for non-intervention under *Shari’ah* is where pricing (presumably excessive) is not detrimental to the society.

constitutional underpinnings for Ordoliberalism in relation to competition³³⁴. In this sense, the EU Commission and Courts are free to adopt whichever approach they deem appropriate.

The Egyptian legislator, likewise, seems to have been inspired by some of the principles of *Shari'ah*. This may be envisaged from the fact that the Egyptian Competition Law is entitled: “Law on the Protection of Competition and *Prohibition of Monopolistic Practices*” (“*Qanoun Himayet Al-Monafsa Wa Mane' Al-Momarasat Al-Ihtikaria*”)³³⁵. In fact, if the legislator was to ignore the *Shari'ah* terminology of monopoly (*ihtikar*), the law would have been named as ‘competition law’ or ‘competition act’; as is indeed commonly used elsewhere.

Ordoliberalism and *Shari'ah* as such have both (arguably) influenced the process of enactment of the EU and Egyptian Competition Laws. The only difference, however, in this respect is where Ordoliberalism does not appear to have any constitutional underpinning in EU. Hence, relevant EU Authorities/Courts are not bound to follow Ordoliberals approaches. *Shari'ah*, on the other, has a constitutional underpinning under the Egyptian system (Article 2 of the Constitution). Nevertheless, there appears to be no explicit direct evidence that Egyptian Authorities/Courts are obliged to follow Islamic principles in their approach. However, it is argued that Article 2 represents a desire from the Egyptian government to comply with Islamic principles within its legal system.

While it is recognized that the EU and Egypt took the initiative of adopting a more economic-based approach to competition law through increasing economic expertise, this development seems to raise some interesting questions in relation to the compliance with their origins. Will the deployment of a more economic-based approach function in contradiction with the Ordoliberal and *Shari'ah* origins? In other words, by virtue of this modernized approach, can competition-related decisions take a different path? If so, will the new approach lead to more lenient/flexible or rather more restrictive decisions?

³³⁴ Although Article 3(3) TEU explicitly refers to SME, this does not mean that the EU Commission and/or Courts are obliged to follow Ordoliberal themes while implementing Article 102 TFEU.

³³⁵ See Law No. 3/2005 on the Protection of Competition and Prohibition of Monopolistic Practices

By moving towards an economic-based approach as such, the EU Commission and ECA (by virtue of Law No. 3/2005 and its Executive Regulations) seem to take into consideration the arguments favouring an effects-based approach. This appears to be in contrast with the Ordoliberal theories and some views of the Islamic jurisprudence in relation to price control. Particularly, the EU Commission's appointment of a CCE exemplifies a departure from Ordoliberal views that primarily focus on the protection of individual freedoms and the limitation of market intervention rather than consumer welfare *per se*. The method of assessment appears to vary. Specifically, Ordoliberals favoured minimum degree of market intervention (arguably compatible with a *per se* approach) seems to contrast with an effects-based analysis. If applied in practice, one may submit that the former method is more rigid than the latter one.

In the same vein, the Egyptian government - through Law No. 3/2005 and its Executive Regulations - seems to depart from the fairness considerations perceived by the Shafi and Hanbali schools regarding the restriction of price control. This is clear from the adoption of economic courts and the intent to increase economic expertise in the ECA³³⁶. However, in contrast with the EU, Egypt, by employing this interventionist approach, reflects its origins – so long as the principles of *no-harm* and *maslahah* are given substantial account when intervening in the market. In this sense, the *Shari'ah* seems to take a less restrictive method of assessment of practices compared with Ordoliberalism – one that seems to coincide with an effects-based approach.

To this end, the EU Commission, by moving towards a more economic-based approach, would be departing to a less restrictive approach than that adopted by its Ordoliberal origins. However, given the lack of a constitutional commitment to follow Ordoliberal theories, investigating authorities are free to move to a more or less restrictive approach. Egypt on the other hand, inspired by the EU in this context, and assuming that it will follow its economic-based approach, would be arguably employing more or less the same approach provided by *Shari'ah*. It is indeed this equilibrium that constitutes the common EU and Egyptian values of competition law. Whether or not, however, the EU and Egypt will employ a modernized economic-based approach in practice – as the

³³⁶ In fact it is argued that this initiative/development in itself reflects the influence of the EU Competition Regime on the Egyptian Competition System.

former explicitly claims - will remain to be discussed in chapters four and five of this thesis.

3.5 CONCLUSION

It is clear that the Ordoliberal theories and thought constitute a core source and origin of EU Competition Law. However, the durability of such influence remains highly questionable. This is based on two imperative intertwined assumptions. First, the Commission and Courts alike are not obliged to follow the Ordoliberal origins on competition on the basis that there appears to be no constitutional underpinning for this. Second, and as a result of the first assumption, the EU Commission is nowadays moving to a more-economic based approach to competition law – one that may not (at least entirely) correspond to Ordoliberals theories and thought (specifically in relation to market intervention).

The influence of *Shari'ah* on the introduction and implementation of Egyptian Competition Law, on the other hand, *so far* appears to be reasonably moderate. Even though there exists a constitutional underpinning of *Shari'ah* under the Egyptian system, there is no direct or explicit evidence that obliges the Egyptian government to adhere to the Islamic principles in practice. Particularly, the influence of *Shari'ah* may be envisaged from the Egyptian system's approach to the analysis of monopolistic practices that seems to favour an effects-based approach in line with the initiative of the EU Commission.

However, Egypt (whether at ECA or Courts level), in contrast with the EU, arguably lacks the necessary economic expertise to conduct economic analysis in competition law at this stage. Consequently, in the event of employing an effects-based approach to abuse of dominance, the risk of committing judicial errors – whether type I or type II – is high. This is perhaps the reason why the ECA, arguably inspired by the EU Commission's initiative, is nowadays seeking to increase expertise in this field. Likewise, the Egyptian government enacted the law establishing economic courts. When, however, Egypt will be ready to employ such approach remains to be investigated in the forthcoming chapters four and five.

CHAPTER 4

THE INFLUENCE OF EU AND ISLAMIC LAWS ON THE TREATMENT OF ABUSE OF DOMINANCE UNDER EGYPTIAN COMPETITION LAW: INVESTIGATING THE DISTINCTIVE CHARACTERISTICS IN EGYPTIAN RULES

CHAPTER 4

THE INFLUENCE OF EU AND ISLAMIC LAWS ON THE TREATMENT OF ABUSE OF DOMINANCE UNDER EGYPTIAN COMPETITION LAW: INVESTIGATING THE DISTINCTIVE CHARACTERISTICS IN EGYPTIAN RULES

4.1 INTRODUCTION

The prohibition of abuse of dominance constitutes an integral part of any competition law system; given the fact that abusive practices may generate detrimental effects on the process of competition and, in some instance, consumers. This is why the (arguably) distinctive features in the treatment of abuse of dominance under Egyptian Competition Law may be critical to the extent that they may eventually harm its economy. The distinctive characteristics that may or may not imply the influence of EU rules or Islamic principles (depending on circumstances) may traverse in two forms. First, where the Egyptian Competition Law does not regulate or discipline certain abusive practices, and, second, where the ECA employs a method of analysis that may not be suitable to it at the current stage – whether or not the concerned competition law stipulates this specific approach may be irrelevant.

The aim of this chapter is to determine the degree of influence of EU rules and Islamic principles on the legal treatment of abuse of dominance under Egyptian Competition Law and, as such, to investigate the distinctive characteristics in the latter system. It is believed that in order to discern the EU rules' influence in particular, a determination of whether or not the Egyptian rules function equivalently with them is deemed necessary. That said the chapter should provide a study on the EU rules on abuse of dominance, aside from the Egyptian ones. The objective here is not, however, to address all forms of abusive conducts and compare them under both systems. The aim is ultimately to explore the distinctive characteristics in the Egyptian treatment of abuse of dominance that may raise Islamic law concerns and could eventually generate potential effects in the economy. In this sense, the chapter adopts a selective approach in relation to the study of abuse of dominance under EU and Egyptian Competition Laws.

The chapter will start off by conceptualizing dominance in terms of definition, legality and determinants under EU and Egyptian laws. It will then move on to investigate the recognition of the abuse of excessive pricing under these laws and determine the Islamicity of the Egyptian treatment in this respect. It will further discern the legal treatment of margin squeeze under EU and Egyptian Competition Laws and investigate the gaps under the latter system as well as the degree of their compliance with Islamic law. Finally, it will investigate the similarities and differences in relation to the method of appraisal of abuse of dominance under EU and Egyptian systems and determine the degree of influence of the former as well as Islamic principles on the Egyptian law.

4.2 CONCEPTUALIZING DOMINANCE UNDER EU AND EGYPTIAN COMPETITION LAWS

4.2.1 The concept of dominance: definition and rationale for legality

The EU's definition of dominance varies from that of Egypt. However, both approaches - broadly speaking - function equivalently in the sense that dominance in itself is not prohibited and that a firm that is dominant in EU and Egyptian jurisdictions is restricted from exercising certain conducts. The distinction rather lies in how and when a firm can be classified as dominant. Having set out these assumptions, some questions should in turn be raised prior to defining the concept of dominance under each system: Why is dominance in itself not prohibited under the EU? Why does Egypt follow the same pattern? Does the lack of prohibition of dominance reflect EU and Egyptian origins of competition law?

4.2.1.1 Dominance under EU Competition Law

While some believe that the legality of dominance in itself in the EU is based on some efficiency considerations rather than Ordoliberalism, others argue that the notion of 'special responsibility' attached to dominant firms demonstrates a sound adherence to Ordoliberalism. For instance, Akman argues that the fact that Article 102 TFEU does not prohibit dominant positions in themselves remains justified by a desired degree of "efficiency"³³⁷. It may be the case that drafters of Article 102 perceive that dominance –

so long as it is not accompanied by any form of abusive practices – raises wealth within the EU and in turn develops its economy. In fact, it is on such basis that Akman argues that Article 102 was drafted from an efficiency angle and not through the lens of Ordoliberalism³³⁸.

Furthermore, according to Akman, by not prohibiting dominant positions, Article 102 TFEU constitutes a solid departure from “Classic Ordoliberalism”; given that the latter would have taken the initiative of prohibiting them in order to avoid conduct control and intervention. In fact, drafters of Article 102 TFEU had the opportunity to initially prohibit dominant positions – an initiative that was supported by the French but importantly declined by the German Delegation who were said to often provide an Ordoliberal vision³³⁹.

Further evidence that Article 102 TFEU is not Ordoliberal is that it aims to provide a protection mechanism, not to a dominant’s competitors or their economic freedom, but rather to the “customers” who deal with it. This is clear from the negotiations conducted by Von Der Groeben who stressed the issue of exclusion of rivals and observed that exclusionary practices do in fact maintain competition as long as they do not comprise an “unfair competition” practice. According to him, drafters did not seem to have viewed that a dominant’s harm to rivals equates with the distortion of competition. They perceived that if a protection mechanism to competitors was to be introduced, it would do so through a separate set of rules - the law on ‘unfair competition’³⁴⁰.

On the other hand, it is argued that the way the notion of “special responsibility” attached to dominant firms is treated under the EU system reflects an Ordoliberal nature. For instance, Ahlborn and Padilla compare the narrow interpretations of *special responsibility* - whereby dominant firms have stricter responsibilities under Article 102 TFEU than non-dominant ones - with its broad perspectives - whereby dominant firms should not exercise conducts which may augment market power and hinder competitors

³³⁷ Akman, P. (2009) “Searching for the Long-Lost Soul of Article 82 EC” 29(2), *Oxford Journal of Legal Studies*, p.294

³³⁸ Ibid

³³⁹ Ibid, pp.294-295

³⁴⁰ Ibid, p.295

irrespective of efficiency gains. More to the point, they believe that this notion is rooted from the Ordoliberalists' "as if" rule (meaning that while they are not entitled to exercise certain conducts, dominant firms should act *as if* they are not dominant)³⁴¹.

Article 102 TFEU does not explicitly define dominance. The EU's definition of dominance derives from its case law. In *United Brands* - as subsequently reflected in *Hoffmann-La Roche* and *Kali-Salz/MdK/Treuhand* - the CoJ defined dominance as: "A position of *economic strength* enjoyed by an undertaking which enables it to *prevent effective competition* being maintained on the relevant market by affording it the power to *behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*"³⁴².

The EU Commission's Discussion Paper and Guidance seem to uphold the *United Brands*' definition. Pursuant to the Discussion Paper, the definition is comprised of three constituents. First, a market must have a position for economic power. Second, this power must be strengthened adequately in a way that would enable "undertaking(s)" at stake to disable "effective competition" in the market and third, empowering it to act "independently to an appreciable extent"³⁴³. In contrast to this understanding, some argue that the CoJ's definition *per se* appears to have only two constituents; the first and second constituents' together, while the third should be contemplated separately³⁴⁴.

Some, however, suggest that the CoJ intended to define dominance in an undividable manner in the sense that the definition should be read as an entire statement. Indeed, it would be unusual if the EU's investigating authorities at stake neglect any of the mentioned constituents. With respect to the definition itself, several issues remain

³⁴¹ Ahlborn, C. and Padilla, A. J. (2007) "From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law" *European Competition Law Annual*, Hart Publishing, available from: <http://www.lecg.com/regions/regiondetail.aspx?regionShortId=3andpubShortId=2958anddisplayMode=publicationdetail> accessed 02/02/2009, pp.17-18

³⁴² Case 27/76, *United Brands Co. and United Brands Continental BV. v. Commission* [1978] E.C.R. 207 ('United Brands'), para.65; Case 85/76, *Hoffmann-La Roche and Co AG v. Commission* [1979] E.C.R. 461 ('Hoffmann-La Roche'), para.38

³⁴³ EU Commission's Discussion Paper, para.21; EU Commission's Guidance, para.10

³⁴⁴ See Whish, R. (2008) "*Competition Law*" 6th Edition, OUP, pp.174-175

questionable. It is irrational to believe that *acting independently* would stand as an appropriate analogy for determining dominance. Regarding the issue of independence from competitors, an undertaking is to some extent restricted by the acts of its competitors who may collectively have an influence on a demand fall for instance and may therefore raise their prices. The undertaking in question in a situation as such would accordingly raise its price to a level not exceeding that of its competitors, for profitability purposes. Thus, independence may not exist in this case³⁴⁵.

Regarding independence from customers - say distributors and ultimate consumers - how can it be said that an undertaking (presumably a manufacturer) acts independently whereas it is committed to certain production and distribution volumes that are set to match the demand side of distributors and ultimate consumers? Put differently, firms - whether efficient or not - conduct market research to identify similar existing products in the market, and determine demand levels, prices etc. This process is usually undertaken prior to supplying these products to the market. Hence, it should not be suggested that undertakings act independently³⁴⁶. Furthermore, the Discussion Paper defined market power – a term that is often associated with dominance³⁴⁷ - as: “The power to influence market prices, output, innovation, the variety or quality of goods and services, or other parameters of competition on the market for a significant period of time”³⁴⁸. This definition resembles the neoclassical approach; according to which substantial market power would mean a firm’s capability to set its prices above the competitive level in a profitable manner and thereby, reduce this market’s output for a substantial period of time³⁴⁹.

Nevertheless some may contest adherence to the neoclassical definition of market power in practice. In fact, it is argued that if a neoclassical approach was to be followed in *United Brands* and *Hoffmann La Roche*, these latter firms may have not been found

³⁴⁵ Gerardin, D., Hofer, P., Louis, F., Petit, N. and Walker, M. (2005) “*The Concept of Dominance in EC Competition Law*” Global Competition Law Centre, available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=770144) accessed 12-08-2007, p.3

³⁴⁶ Ibid.

³⁴⁷ See Monti, G. (2006) “The Concept of Dominance in Article 82” *European Competition Journal* (Special Issue) 31, pp.32-34

³⁴⁸ EU Commission’s Discussion Paper, para.24

³⁴⁹ Monti, G. (2006), *op.cit.*, pp.32-34

dominant. This is because a neoclassical approach seems to substantially narrow the scope of firms by requiring, not only the ability to raise prices above the competitive level and reduce output, but also for a ‘significant period of time’. On the other hand, the definition provided by the CoJ required neither of them³⁵⁰. But what does the ‘significant period of time’ criterion entail? In other words, how does it function in practice? The Commission’s Guidance explicitly clarified this matter. According to the Guidance, the satisfaction of the ‘significant period of time’ criteria “will depend on the product and on the circumstances of the market in question, but normally a period of two years will be sufficient”³⁵¹.

4.2.1.2 Dominance under Egyptian Competition Law

The fact that the Egyptian legislator did not prohibit dominance in itself is (arguably) not incompatible with *Shari’ah*. Neither of the definitions of *prohibited* monopoly provided by the four schools of Islamic jurisprudence – as discussed in the preceding chapter - seems to prohibit dominance. The definitions appear to associate the concept of ‘abuse’ with that of ‘dominance’ rather than the latter in isolation. Truth be said, the precepts and objectives of *Shari’ah* may somehow coincide with dominance or market power. The well-established rule that a practice should not be prohibited unless it generates harm to others may apply in the case of gaining dominance in a given market³⁵². Put differently, dominance or market power – so long as not accompanied with abusive practices – is not usually harmful. This is aside from the fact that dominance is not a practice but is rather a position that *may* generate a practice.

The effects of dominance without abuse, except on the structure of the market, may be relatively minimal. It is perhaps on this basis that the Egyptian legislator does not prohibit it. In fact – on the contrary - encouraging firms’ progress in markets is one of which the objectives and principles of *Shari’ah* may overlap with. The principle of *maslahah* signifies ‘benefits’, ‘interests’ or obtaining equilibrium between ‘private

³⁵⁰ Ibid, pp.38-40

³⁵¹ See EU Commission’s Guidance, at fn.6

³⁵² See Zaki, L. H. (2005/2006) “*Qanun Al-Munafsa Wi Manae Al-Ihtikar*” (The Law on the Protection of Competition and the Prohibition of Monopoly), University of the Six of October, [Book in Arabic], pp.35-36, as cited in chapter 3.

interests’ and the broader scope of ‘public interests’³⁵³. A firm that acquires market power – though not constituting the best of market structures – *may* increase market efficiencies and consumer welfare gains through low prices (public interest). Discouraging market power, on the other hand, *may* mean discouraging firms’ progress – one that may be incompatible with the principles and objectives of *Shari’ah*.

As opposed to Article 102 TFEU, Articles 4 of the Law No. 3/2005 and 7 and 8 of its Executive Regulations provide, not only provide a definition, but also an elaboration on dominance. Article 4 of Law No. 3/2005 provides that: “Dominance in a relevant market is the ability of a person, holding a market share exceeding 25% of the aforementioned market, to have an effective impact on prices or on the volume of supply on it, without his competitors having the ability to limit it. The Authority shall determine the situations of dominance according to the procedures provided for in the Executive Regulations of this Law”³⁵⁴. The definition of dominance as such seems to have missed some of the main features of the concept such as economic power and the hindrance of effective competition to which the EU case law deems necessary. However, the last sentence of Article 4 indicates that there is still more to be added to this definition. Pursuant to Article 7 of the Executive Regulations, dominance provides the existence of three elements. First, the person must hold a market share of more than 25% of the relevant market for a certain period of time. Second, the person should have the ability to influence prices or volume of products supplied in that market and third, the inability of competitors to restrict his or her influence on prices or volume of these products³⁵⁵.

Furthermore, Article 8 of the Executive Regulations, by stipulating that: “The person shall have effective impact on the prices of the products or the quantity supplied in the relevant market if this person has the ability, through his/her *individual acts*, to determine the prices of these products or the quantity supplied in that market where

³⁵³ See Kamali, M. H. (1998) “Principles of Islamic Jurisprudence” 2nd Edition, Kuala Lumpur: Ilmiah Publishers Sdn. Bhd., p.267, as cited by Hasan, Z. (2008) “*Islamic Perspective on the Competition Law and Policy*” available from: (<http://zulkiflihasan.files.wordpress.com/2008/07/islam-and-competition-policy.pdf>) accessed 20-09-2009, p.5, all of which cited in chapter 3.

³⁵⁴ Article 4, Law No. 3/2005

³⁵⁵ Article 7, Executive Regulations

his/her competitors do not have the ability to prevent these acts [...]” does somehow resemble the definition provided by the CoJ in *United Brands*. The wording *individual acts* correspond to the terminology *independently*. The latter may seem, however, narrower in scope. More specifically, the Executive Regulations’ wording seems to extend the scope of dominance to a degree that is broader than that of the EU. A firm that acts individually may or may not behave independently; but a firm that behaves independently would solely act individually³⁵⁶.

In fact, a neoclassical approach – in line with that reflected in the Commission’s Discussion Paper and Guidance – may somehow be envisaged from the wording of Article 8 which states that: “The person shall have effective impact on the prices of the products or the quantity supplied in the relevant market *if this person has the ability, through his/her individual acts, to determine the prices of these products or the quantity supplied in that market where his/her competitors do not have the ability to prevent these acts [...]*”³⁵⁷. However, one should not say that the Egyptian legislator extracted a strict neoclassical perspective to the Egyptian Law and Regulation for several reasons. First, Article 4 of Law No. 3/2005, by providing that an undertaking is “[...] To have an effective impact on prices *or* the quantities supplied [...]” and Article 7(2) of its Executive Regulations providing the “[...] effective impact on the prices of the products *or* on their quantity [...]” may seem, at first sight, broader than the neoclassical approach – as upheld by the Commission - in scope³⁵⁸.

More specifically - as previously highlighted – substantial market power from a neoclassical perspective entails a *firm’s capability to set its prices above the competitive level in a profitable manner and thereby, reduce that market’s output for a substantial period of time*. This approach intends to require an undertaking to have the ability to increase prices **and** reduce output in order to qualify as a market power acquirer.

³⁵⁶ Ibid, Article 8

³⁵⁷ Ibid.

³⁵⁸ Article 4, Law No. 3/2005; Article 7(2), Executive Regulations; Ghoneim, A., Greiss, M. and Holmes, P. (2008) “Chapter Four – Competition” FEMISE Project No. FEM31-08, “*Examining the Deep Integration Aspects of the EU-South Mediterranean Countries: Comparing the Barcelona Process and Neighbourhood Policy, the Case of Egypt*” Contributors: Mona El Garf, Michael Gasiorok, Ahmed F. Ghoneim, Peter Holmes, Javier López González, Dagmar Hertova, Sherine H. Bayoumi, Mourad Greiss, and Radwa Khater, available from: (<http://www.femise.org/PDF/ci2006/FEM31-08.pdf>) accessed 20-12-2009, pp.88-89

However, raising prices *inherently* reduces the volume of output in a given market³⁵⁹. Thus, the sufficiency of proving the ability to raise prices above the competitive level from the part of the ECA would make sense; although in practice, it appears to prove both (even if it reaches a finding that either is satisfied)³⁶⁰.

4.2.2 The determinants of dominance

Given the potentially restrictive consequences of finding dominance, its determination is an important process³⁶¹. Whilst there may exist several determinants of dominance in any dispute, this chapter discusses only two of them; first, market share thresholds and second, market barriers. This selection is based on two assumptions/justifications. First, market share thresholds represent the starting point for competition authorities and courts in respect of the determination of dominance. Second, market barriers are deemed to play a relatively decisive role in dominance findings.

4.2.2.1 Determining dominance under EU Competition Law

Market share threshold is the percentage quantifying the volume of sales that a firm attains in the relevant market³⁶². Following identification of the relevant market, investigating authorities in almost all jurisdictions tend to start off by estimating the market share threshold of alleged dominant undertakings. However, it is controversial whether or not one should rely on these thresholds in determining dominance, since their significance varies from market to another. For instance, in bidding markets, notwithstanding the presence of high market shares, competition may remain fierce and, hence, one cannot consider them as strong indicators of dominance in a situation as

³⁵⁹ It is on the basis of this neoclassical approach that it will be argued later on in this chapter (part 4.3.3.2) that the lack of excessive pricing prohibition under Egyptian Competition Law raises Islamic law concerns; given that the mentioned approach suggests that raising prices in itself limits the volume of output (which arguably complies with the definition of *prohibited* monopoly under *Shari'ah*).

³⁶⁰ For instance, see Report of the Egyptian Competition Authority “*Study on the justifications behind the increase in prices of Steel Rebar in the Egyptian Market in light of the Law on Protection of Competition and Prohibition of Monopolistic Practices*” Study by virtue of the Minister of Trade and Industry’s request dated 16th July, 2006 [Report in Arabic], published on the website on 18th June, 2009, available from: (<http://www.eca.org.eg/ECA/Resolution/List.aspx?CategoryID=2>) accessed 02-11-2009, p.30

³⁶¹ Nonetheless, some argue in favour of dropping the dominance analysis in the event of employing an effects-based approach. This argument will be highlighted in detail in part 4.5 of the present chapter.

³⁶² O’Donoghue, R. and Padilla, A. J. (2006) “*The Law and Economics of Article 82 EC*” 1st Edition, Hart Publishing, Oxford and Portland, Oregon, p.109

such. This is because these markets depend more on the capability to put forward the best bid³⁶³.

Moreover, in a market where both entry and exit are profitably facilitated, not even a dominant firm would be able to price excessively, as there will always be the possibility of new entrants pricing below its price. This is not, however, to say that investigating authorities should not rely on market shares, but rather to suggest that they should treat them with extreme caution and employ other indicators as well, even in the case of high market share thresholds³⁶⁴. Article 102 TFEU does not provide for a minimum threshold as a basis for determination of dominance. The threshold is rather derived from the case law. Generally speaking, the EU case law contemplates market shares of below 25% as conclusive evidence that the concerned firm is not dominant. The Commission, in *Grundig*, did not reach a dominance finding, where it had at hand market shares of 23 and 33% of two of the leading German TV Market. In contrast, in *Virgin/British Airways*, the Commission found British Airways holding a market share of 39.7% in a dominant position³⁶⁵. Market shares that lie between 40-50% do not usually provide a presumption for existence of dominance, as further evidence may be required. The CoJ, in *Hoffmann-La Roche*, did not uphold the Commission's finding of dominance when Hoffmann held a threshold of 43% in the Vitamin B3 market unaccompanied with additional evidence of dominance³⁶⁶.

Market shares that lie between 50-70% are considered under EU practice as substantial thresholds that do enable dominant position presumptions to a large extent. In *Michelin I*, it was held that market shares of 57 and 65 % were adequate for finding dominance, notwithstanding the lack of any supplementary evidences. The CoJ, in *Akzo*, took it even further when it stated that market shares that exceed the 50% create a rebuttable

³⁶³ Ibid, pp.109-112

³⁶⁴ Note that the Discussion Paper upheld this observation. See EU Commission's Discussion Paper, para.34. Also see Mosso, C. E., Ryan, S.A., Albaek, S. and Certella, M. L. T. (2007) "Article 82" *The EC Law of Competition*, 2nd Edition, Faull and Nikpay (Eds.). OUP, pp.313-348

³⁶⁵ Commission Decision 85/404, *EEC Distribution System, Grundig*, OJ 1985 L233, [1988] 4 CMLR 865; Commission Decision IV/D-2/34.780, *Virgin/British Airways*, [2000] O.J. L30/2, paras.91-94; Case T-219/99, *British Airways plc v. Commission*, [2003] E.C.R. II-5917; [2004] 4 CMLR 19 ('British Airways'), as cited by O'Donoghue and Padilla (2006) *op.cit.*, p.115

³⁶⁶ See Case 85/76, *Hoffmann-La Roche and Co AG v. Commission* [1979] E.C.R. 461, para.58, as cited by O'Donoghue and Padilla, (2006) *op.cit.*, p.114

presumption of dominance; in the absence of countervailing evidence³⁶⁷. The EU investigating authorities consider market shares that are above the 70% as a *prima facie* case of dominance. In *Hilti*, the CoJ adopted the Commission's view that a market share of 70-80% would not require any further investigation and so was the case in *Tetra Pak* where it had a 90% market share³⁶⁸.

The above-mentioned cases exemplify the Commission and EU Courts' reasonable reliance on market share thresholds. Market shares, according to former EU Commissioner for Competition Neelie Kroes, provide a: "Useful first indication of the overall market structure"³⁶⁹. What perhaps makes EU rules on dominance more distinctive, as Ahlborn and Padilla write, is the threshold that necessitates intervention. The starting threshold for a dominance presumption is 50%, as the CoJ suggested in *Akzo*³⁷⁰. According to them, this relatively low threshold is proof that the approach to Article 102 TFEU intends to adopt the Ordoliberal standard of *complete competition*³⁷¹.

Notwithstanding the foregoing, in its Guidance, the Commission stated that: "Experience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position [...]. However, as a general rule, the Commission will not come to a final conclusion on the opportunity to pursue a case without examining all the factors which may be sufficient to constrain the behaviour of the undertaking"³⁷². This means that the degree of reliance on market share thresholds

³⁶⁷ See Case 322/81, *NV Nederlandsche Baden-Industrie Michelin v. Commission*, [1983] E.C.R. 3461; Case C-62/86, *Akzo v. Commission*, [1991] E.C.R. I-3359, as cited by O'Donoghue and Padilla, (2006) *op.cit.*, p.114

³⁶⁸ See Cases T-30/89, *Hilti v. Commission* [1992] E.C.R. 1439 and C-53/92; Case T-83/91, *Tetra Pak International v. Commission* [1994] E.C.R. II-755, as cited by O'Donoghue and Padilla (2006) *op.cit.*, pp.113-114

³⁶⁹ Kroes, N. (2008) "The European Commission's Enforcement Priorities as regards Exclusionary Abuses of Dominance – Current Thinking" 3(4), *Competition Law International*, Journal of the Antitrust Committee of the International Bar Association, [October 2008 issue] p.5

³⁷⁰ See Case C-62/86, *Akzo Chemie v. Commission*, [1991] E.C.R. I-3359 ('Akzo'), para.60, as cited by Ahlborn, C. and Padilla, A. J. (2007) "From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law" *European Competition Law Annual*, Hart Publishing, downloadable from:

(<http://www.lecg.com/regions/regiondetail.aspx?regionShortId=3andpubShortId=2958anddisplayMode=publicationdetail>) Accessed 02/02/2009, p.16.

³⁷¹ See Ahlborn and Padilla (2007), *op.cit.*, pp.16-17

³⁷² See EU Commission's Guidance, para.15

will not take an excessive stance. In this sense, one should not necessarily say that this is an adherence to the *complete competition* standard of Ordoliberalism, as Ahlborn and Padilla suggest.

Indeed, Ordoliberals favour a market place whereby its players hold as equal thresholds as possible – one that satisfies the ultimate *complete competition* standard – rather than having large threshold difference that may indicate a case of *impediment competition*. In fact, Ahlborn and Padilla suggest that this desired standard may be envisaged in *British Airways* when the Commission stated that: “Despite the exclusionary commission schemes, competitors of BA have been able to gain market share from BA since the liberalisation of the United Kingdom air transport markets. This cannot indicate that these schemes have had no effect. It can only be assumed that competitors would have had more success in the absence of these abusive commission schemes”³⁷³.

Investigating authorities in almost all jurisdictions determine the existence of barriers to entry and expansion present in the market under scrutiny. Indeed, the way and accuracy in which the outcome is reached varies from jurisdiction to another. The phenomenon of barriers to entry was closely analyzed and addressed by several economists. Bain defines entry barriers as: “The advantages of established sellers in an industry over potential entrant sellers, these advantages being reflected in the extent to which established sellers can persistently raise their prices above a competitive level without attracting new firms to enter the industry”³⁷⁴. According to Bain, economies of scale, product differentiation, cost advantages and capital conditions may stand as barriers to entry³⁷⁵. The Bainian approach of entry barriers was however challenged by Stigler. While Bain contemplates economies of scale, product differentiation and cost advantages as barriers to entry, Stigler believes that neither of them should be considered as such. Instead, he defines barriers to entry as those costs “which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the

³⁷³ See Commission Decision IV/D-2/34.780, *Virgin/British Airways*, [2000] O.J. L 30/1, para.107, as cited by Ahlborn and Padilla (2007), *op.cit.*, p.17

³⁷⁴ Bain, J. S. (1968), “*Industrial Organization*”, 2nd Edition, New York, Wiley, p.252

³⁷⁵ Almgren, T. (2004), “*Barriers to Market Entry and EC Competition Law*” available from: (www.diva-portal.org/diva/getDocument?urn_nbn_se_liu_diva-2468-1_fulltext.pdf) accessed 15-06-2008

For more discussion on Bain’s definition, see Bain, J. S. (1956) “*Barriers to New Competition*” *American Economic Review*, American Economic Association

industry”³⁷⁶. The difference between Bain’s definition and that of Stigler, as Monti suggests, is that while the former perceives barriers to entry from the cost point of view, the latter takes them from easiness of market entry perspective³⁷⁷.

The Commission’s Discussion Paper defines entry and expansion barriers as: “Factors that make entry impossible or unprofitable while permitting established undertakings to charge prices above the competitive level”³⁷⁸. As indicated earlier, market share thresholds are not credible determinants of dominance, even in the case of 100% threshold, since market barriers may not be high³⁷⁹. Barriers - either to entry or expansion - may feature in a legal manner. More precisely, as the Commission indicates in the Discussion Paper, a state may adopt legislative measures granting exclusive rights to governmental entities that thereby, constitute market barriers and, perhaps, enable them to monopolize the market at a later stage³⁸⁰. Legal barriers may also take the form of tariffs that may be in favour of allegedly dominant firms, as reflected in the Commission’s Discussion Paper, followed by its Guidance³⁸¹.

Furthermore, an indispensable form of entry barriers that investigating authorities tend to take into account is sunk or irrecoverable costs. Sunk costs may be defined as: “Those costs that must be incurred in order to compete on a given market, and that are not recoverable upon exit”³⁸². Sunk costs – in other words – are the “capital requirements” which a market necessitates for its entry³⁸³. Sunk cost is a recognized barrier to entry under EU law – though not explicitly stipulated under Article 102 TFEU. The CoJ, in *United Brands*, stated that: “The particular barriers to competitors entering the market are the exceptionally large capital investments required [...], the

³⁷⁶ Stigler, G. J. (1968), “*The Organization of Industry*”, Homewood, IL:R.D.Irwin, p.67

³⁷⁷ Monti, G. (2007) *op.cit.*, pp.144-146

³⁷⁸ EU Commission’s Discussion Paper, para.38

³⁷⁹ Gerardin, D., Hofer, P., Louis, F., Petit, N. and Walker, M. (2005) “*The Concept of Dominance in EC Competition Law*” Global Competition Law Centre, p.14

³⁸⁰ EU Commission’s Discussion Paper, para.40

³⁸¹ *Ibid.*; EU Commission’s Guidance, para.17

³⁸² Gerardin, D., Hofer, P., Louis, F., Petit, N. and Walker, M. (2005) “*The Concept of Dominance in EC Competition Law*” Global Competition Law Centre, p.15

³⁸³ Dunphy, P. (2005) “*Within Article 82 EC the Court of Justice has given a wide interpretation to the concept of “barriers to entry”. Is this wider interpretation conducive to the Community Competition Telos?*” available from: (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999580) accessed 20-12-2009, p.3

introduction of an essential system of logistics [...], economies of scale from which newcomers to the market cannot derive any immediate benefit and the actual cost of entry made up inter alia of all the general expenses incurred in penetrating the market such as the setting up of an adequate commercial network, the mounting of very large-scale advertising campaigns, all those financial risks, the costs of which are irrecoverable if the attempt fails”. In fact, it is on the basis of these sunk costs that the CoJ found United Brands dominant³⁸⁴.

4.2.2.2 Determining dominance under Egyptian Competition Law

The elements necessary for determining dominance under the Egyptian system are stipulated under Article 4 of Law No. 3/2005, which provides that: “Dominance in a relevant market is the ability of a person, holding a market share exceeding 25% of the aforementioned market, to have an effective impact on prices or on the volume of supply on it, without his competitors having the ability to limit it”,³⁸⁵. In this sense, for a firm to be found dominant under Law No. 3/2005, it has to satisfy the following pre-requisites:

1. It holds a market share threshold that exceeds 25% of the relevant market;
2. It has the ability to have an effective impact on market prices or the volume of output; and
3. The inability of competitors to limit such ability.

It is important to note that the pre-requisites above-mentioned *all* ought to be satisfied. This means that if the ECA or court finds that the firm under scrutiny does not satisfy one of these pre-requisites, it shall not resume its analysis of the remaining criteria; and will thus not find that firm as dominant. However, the ECA has shown reluctance to rely on market share thresholds for dominance findings. For instance, in the *Cement* case, albeit finding Suez Group to have held a threshold of 30%, the ECA did not reach

³⁸⁴ See Case C-27/76, *United Brands Co. and United Brands Continental BV. v. Commission*, [1978] E.C.R. 207, para.122, as cited by Gerardin, D., Hofer, P., Louis, F., Petit, N. and Walker, M. (2005) “*The Concept of Dominance in EC Competition Law*” Global Competition Law Centre, p.16

³⁸⁵ Article 4, Law No. 3/2005

a dominance finding on the basis of not satisfying other pre-requisites³⁸⁶. Moreover, in the *Steel* study, it found Ezz Group to have held a threshold of over 25% of the relevant market but only reached a dominance finding after a thorough analysis of the remaining pre-requisites³⁸⁷. In the same vein, in its study of the *Vegetable Oil* market, the ECA found that although one of the companies held 45.56% of the relevant market, it was not dominant on the basis of its inability to have an effective impact on prices³⁸⁸. This means that market share thresholds provide no more than a first indication that guides the ECA on whether to analyse the remaining criteria³⁸⁹.

Article 8 of the Executive Regulations expands on the generic stipulation provided by Article 4. It provides that: “The person shall have effective impact on the prices of the products or the quantity supplied in the relevant market if this person has the ability, through his/her individual acts, to determine the prices of these products or the quantity supplied in that market where his/her competitors do not have the ability to prevent these acts, taking into consideration the following factors:

- a) *The person's share in the relevant market and his/her position in comparison to the remaining competitors;*
- b) *The conduct of the person in the relevant market in the previous period;*
- c) *The number of competing persons in the relevant market and its relative impact on the structure of that market;*

³⁸⁶ Report of the Egyptian Competition Authority, “*Study on the Cement Market in the Arab Republic of Egypt in light of the Law on Protection of Competition and Prohibition of Monopolistic Practices*” Study by virtue of the Minister of Trade and Industry’s request dated 16th July, 2006 [Report in Arabic], published on the website on 5th September, 2008, available from: (<http://www.eca.org.eg/ECA/Publication/List.aspx?CategoryID=1>) accessed 01-10-2009, p.29
Note that the Court of First Instance and Court of Appeal upheld this decision. See *Public Prosecution v National Cement Co & Others*, Court of First Instance, Misdemeanours Nasr City Case 2900/2008, August 25, 2008; *Public Prosecution v National Cement Co & Others*, Court of Appeal, Misdemeanours East Cairo Case 22622/2008

³⁸⁷ See Report of the Egyptian Competition Authority on the *Steel Rebar* Market, pp.25-38

³⁸⁸ See Report of the Egyptian Competition Authority “*Study of the Vegetable Oil Market light of the Law on Protection of Competition and Prohibition of Monopolistic Practices*” Study by virtue of the Minister of Trade and Industry’s request dated 26th December, 2007 [Report in Arabic], published on the website in September, 2010, available from: (<http://www.eca.org.eg/ECA/Publication/List.aspx?CategoryID=1>) accessed 15-09-2010, p.31

³⁸⁹ Greiss, M. (2010) “Abuse of dominance under the Egyptian Competition Law: Investigating peculiarities that may have special effects in the economy” (2), *Mediterranean Competition Bulletin*, available from: (<http://ec.europa.eu/competition/publications/mediterranean/index.html>), accessed 29-11-2010, p.23

- d) *The ability of the person and his/her competitors to obtain the raw materials necessary for production; and*
- e) *The existence of barriers facing other persons to enter the relevant market*”³⁹⁰

The above-mentioned factors are collectively given due consideration in the analysis of dominance. However, Article 8 as such does not appear to define the form of market barriers needed for a dominance finding. Unusually the form and factors of market barriers were left to the case law to determine³⁹¹. In its *Steel* study, the ECA found that Ezz Group had satisfied the *effective impact on prices* criterion, pursuant to Article 4, on the basis that its competitors (other Steel Rebar producers) were more or less forced to set their prices below it. The ECA also found that albeit such a price difference and while competitors may have had higher levels of demand, Ezz Group did not modify its prices. That said, the ECA found that Ezz Group had adopted its pricing policy individually i.e. without having to take into account the pricing policies of its competitors and thus found that Ezz Group had satisfied the *effective impact on prices* pre-requisite³⁹².

The question that should be raised in this respect: Does Ezz Group – by satisfying ‘the ability to have an effective impact on prices’ pre-requisite – violate *Shari’ah*? In other words, does it deserve intervention from the ECA from an Islamic law viewpoint? Indeed this inquiry roots from the legality of dominance in itself under *Shari’ah* (as discussed earlier). However, it is important to take into account the ECA’s appraisal for a more in-depth answer rather than merely depending on legal provisions. The definitions of *prohibited* monopoly provided by the Islamic jurisprudence mostly refer to food (and more precisely: Grain) or other essential products. Yet, Steel may arguably be contemplated as an essential product.

Furthermore, these definitions seem to present mere illustrations and hence one should not consider dealing with products other than these mentioned in them (in

³⁹⁰ Article 8, Executive Regulations

³⁹¹ The unusualness in this respect derives from the fact that civil law countries (like Egypt) tend to declare legislation as the main source of law to Civil law. The role of enforcers – as most commonly perceived – is to merely apply such legislation (or laws rooted from it) without usually adopting new rules and precepts not stipulated under such legislation/laws.

³⁹² See Report of the Egyptian Competition Authority on the *Steel Rebar Market*, pp.26-30

corresponding circumstances) as permitted under *Shari'ah*. To this end, assuming that Steel is encompassed and applying these definitions in light of the ECA's analysis on Ezz Group's ability signifies that the latter is compliant with *Shari'ah* (arguably) as long as it does not sell its Steel at inflated or below-cost prices (as will be discussed in parts 4.3.3.2 and 4.4.4 respectively). In fact, the ability to have an effective influence on prices in itself is not prohibited under *Shari'ah*. It is "a must" for Ezz Group to exploit such ability for its acts to violate *Shari'ah*. Intervention in turn should not take place in respect of Ezz Group's ability. In fact, market intervention in a situation as such may contradict with *Shari'ah*. It should, however, be stressed that the ECA, by determining Ezz Group's ability to have an effective impact on market prices for the purposes of assessing the existence of dominance is not considered as intervening – as intervention under *Shari'ah* entails price control. Clearly the Egyptian legislator *gave account to this aspect*.

Moreover, the ECA found that Ezz Group had satisfied the *ability to affect the volume of output* criterion on grounds that it acquired more than 50% of the market's total production, it occupied the highest volume of production capacity in comparison to its competitors; and, had privilege over its competitors in terms of obtaining the necessary raw material³⁹³. It should be noted in this respect that the ability of an incumbent to have an effective impact on the volume of output in a given market is well recognized under *Shari'ah*. In fact, monopoly is not prohibited unless the incumbent "withholds" a product for a certain period of time. Although the meaning of 'withholding' varies from that of having the ability to affect the quantity of output, it somehow coincides with it. While on the one hand, a company which maintains the ability to have an impact on the volume of output of a specific product is able to eventually withhold it, on the other hand, a company that does not have such ability may not have the capacity to withhold that product for a given time. It is on this basis that one should not doubt on the Islamicity of providing the *ability to influence the volume of output* as a pre-requisite for dominance findings – similar to the *ability to have an effective impact on market prices*.

³⁹³ Ibid, pp.26-31

The ECA furthermore found that Ezz Group had satisfied the *inability of competitors to have an effective influence on prices and output* criterion. Particularly, it assessed the satisfaction of this pre-requisite through an investigation of two factors: Legal barriers and sunk costs (i.e. the ability to establish new industries). It found that imports of Steel Rebar were impeded by the imposition of anti-dumping duties. Nonetheless the ECA stressed that although these duties had terminated, imports of Steel Rebar did not exceed 1.5% of the total volume of output in the relevant market. In relation to the second factor (sunk costs), the ECA indicated that establishing a new industry for the production of Steel Rebar requires vast investments - despite the size of investment required varies according to the kind of industries or stage of production. Justifying such finding, the ECA contended that even though the market featured new entrants, they were merely rolling industries that were not capable of posing fierce competition towards Ezz Group. This is because these industries would incur costs that are higher than those incurred by finished industries – a factor that may make them ineffective in the market whether in terms of pricing or volume of output³⁹⁴.

4.3 REGULATING THE ABUSE OF EXCESSIVE PRICING

4.3.1 The practice of excessive pricing: Definition and arguments for and against prohibition

In principle, markets are renowned to be at their highest degree of efficiency when prices are *competitive*. While consumers suffer substantially at high prices in a manner that may eventually deter total welfare of society, firms, likewise, endure the costs of significant investments at low prices that may lead to unsuccessful market entry or exist³⁹⁵. But how are *excessive* or *unfair* prices defined? Under EU law, the practice of excessive pricing is classified under the category of *exploitative* abuses³⁹⁶. The literature

³⁹⁴ Ibid, pp.36-38

³⁹⁵ See Katz, M. L. and Rosen, H. S. (1998) “*Microeconomics*” 3rd Edition, Boston, MA: Irwin/McGraw-Hill, p.11, as cited by Evans, D. S. and Padilla, A. J. (2005), “Excessive pricing: using economics to define administrable legal rules” 1(1), *Journal of Competition Law and Economics*, OUP, p.99

³⁹⁶ Abusive practices under Article 102 TFEU are classified under two main categories: Exclusionary abuses and exploitative abuses. Exclusionary abuses are composed of practices that hinder the competitive process and exclude competitors from the market. This category includes abuses like refusal to deal, margin squeeze and predatory pricing. Exploitative abuses (excessive pricing) are those practices where the dominant firm at stake makes use of its position in the market by engaging in exploitative or excessive pricing in a manner that directly deters consumer welfare. See Akman, P. (2009) “*Exploitative abuse in Article 82 EC: Back to basics?*” Working Paper 09-1, available from:

does not appear to agree on a single or cohesive definition. Marxists economists argue that a price becomes *fair* when it equates with the “value of labour” used for production of goods in question³⁹⁷. Neoclassical economists suggest that the *fair* price of goods or services rests on their *competitive* market price³⁹⁸. Modern industrial organisation theorists tend to perceive excessive prices as: “Those which are set *significantly* and *persistently* above the competitive level as a result of the exercise of market power”³⁹⁹. In general terms, and in light of these views, for a price to be contemplated as *unfair* or *excessive*, it should be set well above the *competitive* level in a manner.

Despite numerous economists describing the ability to increase prices and reduce output as a strong reason for condemning monopoly, the conduct of excessive pricing has infrequently been challenged by competition authorities. This may be rationalized by several justifications; for instance, the power to charge high prices and, consequently, reduce output is generally contemplated as a core feature of monopoly. Hence, disputing monopolists on the premise of having such powers may presuppose that dominance in itself is incompliant with competition law and would thus necessitate intervention⁴⁰⁰.

Moreover, regulating excessive pricing and disciplining firms that exercise such conduct may discourage innovation and cost reduction. In fact, in *Verizon Communications Inc. v. Law Offices of Curtis V Trinko LLP*, the U.S. Supreme Court interestingly stated that the “Opportunity to charge monopoly prices – at least for a short period – is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth”⁴⁰¹. Furthermore, excessive pricing induces market entrants who attempt to under-cut prices of the dominant firm at stake in

(https://www.uea.ac.uk/polopoly_fs/1.105848!wp09-1_exploitative_abuse_in_article82EC_PA.pdf)
accessed 29-11-2010, pp.3-4

Nonetheless, one should not contemplate these as *hard* categories; for instance, exclusionary conducts may indirectly facilitate exploitative practices. In fact, under Law No. 3/2005 and its Executive Regulations (Articles 8 and 13 respectively) there is no such classification of exclusionary or exploitative abusive practices.

³⁹⁷ Marx, K. (1887) “*Capital*” Frederick Engels Edition, as cited by Evans and Padilla (2005) *op.cit.*, p.100

³⁹⁸ See Marshall, A. (1890) “*Principles of Economics*” London: Macmillan, as cited by Evans and Padilla (2005) *op.cit.*, p.100

³⁹⁹ Tirole, J. (1988) “*The Theory of Industrial Organisation*” (Cambridge, MIT Press), as cited by O’Donoghue and Padilla (2006) *op.cit.* p.604

⁴⁰⁰ Monti (2007) *op.cit.*, p.218

⁴⁰¹ See *Verizon Communications Inc. v. Law Offices of Curtis V Trinko LLP*, 540 US 398, 407 (2004), as cited by Monti (2007) *op.cit.*, p.218

pursuit of profit – often named as “self-correction”⁴⁰². In this sense, jurisdictions that do not prohibit excessive pricing – most notably U.S. Antitrust Law - often deem intervention unnecessary⁴⁰³. However, in markets where entry barriers are quite high, excessive prices are likely to prevail for long periods. In fact, the controversy over whether or not the conduct of excessive pricing is *self-corrective* is vast⁴⁰⁴.

The general theme developed in the literature is that excessive pricing induces market entry in a manner that undermines the ability of the dominant firm concerned to price excessively (*self-corrective* status)⁴⁰⁵. This signifies that a pricing structure as such does not necessitate an interventionist regime. In contrast, however, Ezrachi and Gilo suggest that excessive pricing does “not attract entry” and thus “non-intervention” should not be rationalized by *self-correction*⁴⁰⁶. They argue that potential entrants are mostly concerned with “post-entry” prices rather than “pre-entry” ones; to which proponents of self-corrective/non-interventionist approach seem to rely on. This is because “pre-entry” prices are not important unless they provide an indication to potential entrants that the incumbent firm in question is “inefficient” – an intuition that entry could be “profitable”. Conversely, if the potential entrant obtains the necessary information on the incumbent’s cost advantages and deems that the latter is more efficient, it may choose not to enter; even though the incumbent’s prices are excessive. This is because as soon as entry takes place, the incumbent would reduce its prices in response to new entry⁴⁰⁷.

⁴⁰² Ezrachi, A. and Gilo, D. (2010) “*Excessive Pricing, Entry, Assessment and Investment – Lessons from the Mittal Litigation*” available from: (http://www.tau.ac.il/law/members/gilo/excessive-pricing-alj-Ezrachi-Gilo-final_draft_2_.pdf) accessed 20-11-2010, p.7

⁴⁰³ See *Berkey Photo Inc. v. Eastman Kodak Co.* 603 F 2d 263, 294 (2d Cir. 1979) as cited by Monti (2007) *op.cit.*, p.218; Ezrachi, A. and Gilo, D. (2010) *op.cit.*, p.2. This approach reflects the Chicago School’s views that argue against regulating excessive pricing on the basis that the market will maintain itself through price under-cutting; whether by competitors or potential entrants. See for instance, Demsetz, H. (1973) “Industry Structure, Market Rivalry and Public Policy” (3), *Journal of Law and Economics*, pp.1-9

⁴⁰⁴ Ezrachi, A. and Gilo, D. (2010) *op.cit.*, p.7

⁴⁰⁵ See, for instance, Areeda, P. E. and Hovenkamp, H. (2006) “*Antitrust Law: An Analysis of Antitrust Principles and their Application*” New York, Aspen; Korah, V. (1997) “*EC Competition Law and Practice*” 6th Edition, Hart Publishing, p.113; O’Donoghue and Padilla (2006) *op.cit.*, pp.635-636

⁴⁰⁶ Ezrachi, A. and Gilo, D. (2010), pp.7-8; Ezrachi, A. and Gilo, D. (2008) “Are Excessive Prices Really Self-Correcting” 5(2), *Journal of Competition Law and Economics*, OUP, pp.254-262

⁴⁰⁷ Ezrachi, A. and Gilo, D. (2010) *op.cit.*, pp.8-9

In addition, a determination of whether or not the price at stake is *excessive*, and thus abusive, is multifaceted. What “standards” should the investigator embrace? Comparing the incumbent’s price at stake with a “hypothetical competitive price” could be irrational. Adopting a “reasonable price” through adding an “acceptable profit margin” to the “actual cost” of the product in question would likewise not be pragmatic. For instance, it may be questionable whether the investigator should rely on “historic” costs as an analogy for such simulation or instead on nowadays costs. Moreover, a large profit margin does not necessarily signify exploitative pricing; but may rather be based on efficiency of the firm in question⁴⁰⁸. In the same vein, competition authorities devising suitable prices would turn them into “regulators” rather than dispute settlers⁴⁰⁹.

Furthermore, some view that tolerating excessive pricing may enable the incumbent to invest extensively and develop new products. However, this argument was criticised on the basis that the society may have a restricted volume of output in return. This is in addition to the detrimental effects on consumer welfare. In fact, some argue that the monopoly rents incurred by consumers in this respect that are said to be invested in developing products may have been utilised in a more efficient manner that would have benefited the economy⁴¹⁰.

Notwithstanding the potency of these arguments countering the prohibition of excessive pricing, there exists a couple of intriguing arguments in favour of regulating these practices. First, excessive pricing represents the “most direct violation” to the interests of consumers to which competition laws essentially intend to safeguard. It is, moreover, argued that market structure does not always preclude the success of excessive pricing. There may prevail in some “*exceptional circumstances*” in which a given market structure could permit excessive pricing that would solely be cured by competition law intervention. Second, while it is relatively true that prohibiting excessive pricing may hamper investment incentives and new entry, it is argued that a thoroughly considered policy may overcome these complexities⁴¹¹.

⁴⁰⁸ Whish, R. (2008) “*Competition Law*” 6th Edition, OUP, pp.709-711

⁴⁰⁹ Monti (2007) *op.cit.*, p.219

⁴¹⁰ Whish (2008) *op.cit.*, pp.709-711

4.3.2 The recognition of excessive pricing under EU Competition Law: An investigative priority?

Article 102(a) TFEU prohibits excessive pricing by dominant firms. More specifically a dominant firm is prohibited from “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions”⁴¹². In essence, this means that a dominant firm may be caught under Article 102(a) if it sells at “*unfairly high prices*”; or otherwise purchases goods or services at “*unfairly low prices*”⁴¹³. It should be noted, however, that Article 102(a) as such does *not* require the EU Commission to prohibit excessive pricing; it rather gives it the capacity to do so. The number of excessive pricing cases – whether at the EU or member states level – is quite minimal. Nonetheless, some suggest that the existing case law provides a clear guidance as to how excessive is treated in the EU⁴¹⁴. The leading case is the decision in *United Brands*⁴¹⁵.

In *United Brands*, the Commission found United Brands, a well-established Bananas firm, to have abused, inter alia its dominant position through pricing excessively. It was found that the prices that United Brands sold its Chiquita bananas in Belgium, Luxembourg, Denmark and Germany were unfairly high⁴¹⁶. The Commission investigated the price disparities between branded and unbranded bananas. It found that Chiquita bananas in general were vended at 30-40% to the unbranded bananas of United Brands⁴¹⁷. The Commission then compared United Brands’ prices in the EU. It found that bananas that were sold in Dublin, Ireland were the cheapest. It also found that the prices charged in Belgium, Luxembourg, Denmark and Germany were as double as those in Dublin. The Commission then held that United Brands’ prices were excessive outside Ireland by 15%⁴¹⁸. However, it did not to justify how it arrived at this margin. In addition, as Evans and Padilla suggest, the Commission did not provide an estimate of

⁴¹¹ Motta, M. and Streel, A. D. (2007) “Excessive Pricing in Competition Law: Never say Never?” *The Pros and Cons of High Prices*, Stockholm: Konkurrensverket – Swedish Competition Authority, available from: (http://www.barcelonagse.eu/tmp/pdf/motta_excessivepricing.pdf) accessed 01-06-2010

⁴¹² Article 102, Treaty on the Functioning of the European Union, O.J. C.306/01, [2007]

⁴¹³ Evans and Padilla, (2005) *op.cit.*, p.98

⁴¹⁴ Motta, M. and Streel, A. D. (2007) *op.cit.*, p.16

⁴¹⁵ O’Donoghue and Padilla (2006) *op.cit.*, p.608

⁴¹⁶ See Commission Decision IV/26699, *Chiquita*, [1975] O.J. L.095

⁴¹⁷ *Ibid*, para.5

⁴¹⁸ *Ibid*, paras.6-7

United Brands' costs of production – relying mostly on the profit rates the company had attained from sales in Ireland⁴¹⁹.

On appeal, the CoJ found that the prices it charged were merely 7% higher than its competitors – a discrepancy which should not have been deemed excessive - and indicated that the Commission had abandoned United Brands' costs structure⁴²⁰. Instead, the determination of the excessiveness of prices should be based on a two-tiered test according to the CoJ's approach, as some suggest. First, it involves a comparison of the product's actual costs with its prices. Second, it necessitates a verification of whether a price is unfairly high or excessive in "itself" or through a price comparison with competitors of the firm in question. The CoJ seemed to employ this approach when it pointed out the Commission decision's errors. At the outset, it indicated the Commission's abandonment of United Brands' cost structure. It also found that United Brands' price disparity in comparison with that of its competitors was not substantial so as to be excessive⁴²¹.

In *General Motors*, the Commission, applying the same approach employed in *United Brands*, held that the former had priced its vehicle conformity inspections excessively. Particularly, it found that General Motors had charged the same prices for conformity inspection of both European and American models; notwithstanding that European ones cost less⁴²². More recently, in *British Leyland*, deploying the same economic value/costs correlation, the Commission found that the vehicle manufacturer had charged excessive prices for certificates for left and right-handed cars; despite that the costs of inspections were the same⁴²³. The question that should be raised in this respect: Are excessive prices objectively justifiable within the context of Article 102 TFEU? According to

⁴¹⁹ Evans and Padilla, (2005), *op.cit.*, p.104

⁴²⁰ Case 27/76, *United Brands Co. and United Brands Continental BV. v. Commission* [1978] E.C.R. 207, paras.251, 265 and 266, as cited by Evans and Padilla (2005) *op.cit.*, p.105

⁴²¹ Evans and Padilla (2005) *op.cit.*, p.108

⁴²² See Commission Decision IV/28.851, *General Motors Continental*, [1974] O.J. L 029. However, this decision was overturned on appeal. See Case 26/75, *General Motors Continental NV v Commission* [1975] E.C.R.1367

⁴²³ See Commission Decision Case 226/84, *British Leyland*, [1984], L. 207/11.

Note that this decision was upheld on appeal. See Case 226/84, *British Leyland plc v. Commission*, [1987], 1 CMLR 185

For a more recent case that adopted the approach itself, see Commission Decision Case COMP/A.36.568/D3, *Scandlines Sverige AB v. Port of Helsingborg*, [2004]

O'Donoghue and Padilla, such practice is capable of being objectively justified. This may be envisaged from the CoJ when it overturned the Commission's decision in *General Motors* on the basis that the firm presented "an adequate explanation" for its prices⁴²⁴.

It is vital to note, however, that the practice of excessive pricing, although constituting a prohibition under Article 102 TFEU, does not represent a priority for investigation by the Commission. While in office, Commissioner Kroes once stressed: "It is wise in enforcement policy to *give priority to so-called exclusionary abuses*, since exclusion is often at the basis of later exploitation of customers". On a more recent occasion, the Commission in its Guidance stated that: "For the purpose of providing guidance on its enforcement priorities *the Commission at this stage limits itself to exclusionary conduct* and in particular certain specific types of exclusionary conduct which, based on its experience, appear to be the most common". Indeed it may be questionable that the Commission seeks to prevent exclusionary abuses on the basis that they *indirectly* harm consumers (that is indeed the ultimate EU Competition Law objective) without giving priority to exploitative abuses that *directly* harm or exploit consumers⁴²⁵. However, one may argue that excessive pricing is not prioritized as such on the basis that it is difficult to assess and investigate⁴²⁶.

⁴²⁴ However, it is argued that the notion of objective justification of exploitative practices is equivocal; as opposed to that notion in relation to exclusionary practices (as will be discussed later on in the present chapter (part 4.5.1)). See O'Donoghue, R. and Padilla, A. J. (2006) *op.cit.*, p.626 citing Case 26/75, *General Motors Continental NV v Commission* [1975] E.C.R.1367, para.21

⁴²⁵ See Kroes, N. (2006) "Tackling Exclusionary Practices to Avoid Exploitation of Market Power: Some Preliminary Thoughts on the Policy Review of Article 82" Hawk, B. (ed.) *International Antitrust Law and Policy: Fordham Corporate Law Institute Annual Proceedings*, New York Juris Publishing, p.384; EU Commission's Guidance, para.7; Akman, P. (2009) "*Exploitative abuse in Article 82 EC: Back to basics?*" Working Paper 09-1, available from: (https://www.uea.ac.uk/polopoly_fs/1.105848!wp09-1_exploitative_abuse_in_article82EC_PA.pdf) accessed 29-11-2010, pp.4-6

⁴²⁶ In fact, it is argued that competition authorities/courts (where their laws prohibit excessive pricing) often wish they did not have to investigate such practice. A good example for this is arguably the South African *Mittal* case [as will be discussed in part 5.3 (chapter five)].

4.3.3 The lack of excessive pricing prohibition under Egyptian Competition Law

4.3.3.1 The legality of high pricing in general under Egyptian Competition Law

In contrast with Article 102 TFEU, the list of abuses stipulated under Articles 8 of Law No. 3/2005 is “exhaustive”. This means that abusive practices that are not stipulated therein are not prohibited. The list does not contain excessive pricing⁴²⁷. In fact, the ECA’s former Chairperson, in her message in the Annual Report of 2006-2007, stated that: “The increase in prices has become a major problem in the marketplace. Though [high] price is not directly addressed by the competition law, it can, however, indicate practices that violate the law”⁴²⁸. This indeed explains why the ECA in some occasions conducts studies on markets primarily on the basis of high prices. For instance, the *Steel* report was entitled: “Study on Justifications behind *Increase in Prices* of Steel Rebar in the Egyptian Market”⁴²⁹. In other words, the fact that the ECA rationalizes its intervention by high prices in a given market does not necessarily mean that it deems excessive or generally high pricing in itself a violation to competition law⁴³⁰.

It is, however, surprising and perhaps questionable that the Law No. 3/2005 and its Executive Regulations stipulate the: “Ability of a person [...] to have an effective impact on prices [...] without his competitors having the ability to limit it [...]” as means for determination of dominance, whilst *not* explicitly prohibiting excessive pricing⁴³¹. In essence, this stipulation means that a firm’s ability to increase market prices should not be influenced by its competitors’ ability to successfully undercut it. Hence, the difference between such stipulation and excessive pricing is that the former stands as a means for determining dominance that is neither in itself prohibited under Law No.

⁴²⁷ Interview with Dr. Khalid Attia, former Executive Director, Egyptian Competition Authority, dated 29-04-2010

⁴²⁸ Annual Report of the Egyptian Competition Authority (2006/2007) published on the following website on 15th June, 2008, available from: (<http://www.eca.org.eg/EgyptianCompetitionAuthority/Publication/List.aspx>) accessed 16-06-2008, pp.3-4, emphasis added

⁴²⁹ See Report of the Egyptian Competition Authority on the *Steel Rebar* Market

⁴³⁰ Greiss, M. (2010) *op.cit.*, p.24

⁴³¹ Article 4, Law No. 3/2005

3/2005 and its Executive Regulations nor condemned by *Shari'ah*, while the latter is an abuse of such position⁴³².

Nevertheless, some *may* argue that excessive pricing may develop in the form of refusal to deal and could, thus, be caught under Article 8(b) of Law No. 3/2005⁴³³. Advocates of such view may invoke the procedures for investigating refusal to deal conducts; as stipulated under the Executive Regulations. More specifically, Article 13(b) prohibits a dominant firm from: “Refraining from entry into sale or purchase transaction regarding a product with any person or totally ceasing to deal with it in a manner that results in *restricting that person's freedom to access or exit the market at any time, which includes imposing financial conditions or obligations or abusive contractual conditions or conditions that are unusual in the activity subject matter of dealings*”⁴³⁴.

However, an argument as such may be countered on the basis that the wording of Article 13(b) seems to primarily confine the prohibition to upstream market dealings or dealings amid producers, suppliers, distributors or wholesalers and, as such, may not necessarily extend to consumers. Moreover, Article 13(b), notwithstanding that it may be construed to prohibit imposing high or abusive prices, it may be limited to the situation where the purchase agreement in question does not come into force. This means that the tangible effects of the excessiveness of prices are merely confined to the firm(s), which found that the sale conditions were deemed *unusual*. Even if one presupposes that it covers the event where the buyer (or retailer) agrees to conclude the deal, even though it involves tough financial conditions⁴³⁵, it certainly does not cover a prohibition of excessive pricing. In fact, Article 13(b) as such is only restricted to refusal to deal (or ‘constructive’ refusal to deal) abuses (as will be argued later in part 4.4).

⁴³² Greiss, M. (2010) *op.cit.*, p.25

⁴³³ Article 8(b) of Law No. 3/2005 prohibits a dominant firm from: “Refraining to enter into sale or purchase transactions regarding a product with any person or totally ceasing to deal with him in a manner that results in restricting that person’s freedom to access or exit the market at any time”.

⁴³⁴ Article 13(b), Executive Regulations; Greiss, M. (2010) *op.cit.*, p.25

⁴³⁵ Note that it will be argued in favour of this broad interpretation in relation to the determination of whether or not Egyptian Competition Law prohibits the practice of margin squeeze (part 4.4.3 in this chapter). Greiss, M. (2010) *op.cit.*, p.25

Moreover, it *may* be argued that high pricing could be prohibited in the form of price discrimination in relation to the firm(s) incurring such prices, pursuant to Article 8(e) of Law No. 3/2005⁴³⁶. However, this abusive practice assumes that a dominant firm charges different prices to its customers; a practice which a dominant firm may not necessarily resort to. In other words, the dominant firm may rather favour charging similar high prices to all its customers; a practice that would certainly not be caught under Article 8(e)⁴³⁷.

Furthermore, the hardcore prohibition of price fixing among competitors, whilst often leading to high prices in the market in question⁴³⁸, does not cover all the common elements of prohibition of excessive price abuses. First, price fixing assumes the existence of an agreement on market prices – whether verbal or written - between two or more competitors (horizontal agreement). Second, such agreement may not necessarily relate to high prices⁴³⁹. Excessive pricing, on the other hand, may be practised by one or more firms and does not require an agreement between competitors to restrict competition⁴⁴⁰.

The concern pertaining to a prohibition of excessive pricing should instead be narrower in scope. If excessive pricing were to be prohibited, the Egyptian legislator would have provided a definition of excessive pricing and stipulated the necessary test to determine excessive prices. This includes the agreed upon benchmark that ought to be followed in investigations⁴⁴¹. Consequently, the fact that these provisions may, on some occasions,

⁴³⁶ Article 8(e) of Law No. 3/2005 prohibits a dominant firm from: “Discriminating between sellers or buyers having similar commercial positions in respect of sale or purchase prices or in the terms of the transaction”.

⁴³⁷ Greiss, M. (2010) *op.cit.*, p.25

⁴³⁸ For instance, see Report of the Egyptian Competition Authority on the *Cement* Market.

⁴³⁹ See Article 6(a), Law No. 3/2005; Articles 10, 11(a), Executive Regulations

⁴⁴⁰ Greiss, M. (2010) *op.cit.*, p.26

⁴⁴¹ It is worthy to note that the prohibition of excessive pricing in countries which do not contemplate case-law as one of their main sources of legislation – as is the case in EU law – is usually accompanied by a definition of excessive prices. In south Africa, for instance, Section 1(1)(ix) of the South African Competition Act defines excessive pricing as “a price for a good or service which [...] bears no reasonable relation to its economic value of that good or service [...]”. This definition is accompanied by Section 8(a) of the South African Competition Act which prohibits excessive pricing by stipulating that: “it is prohibited for a dominant firm – (a) to charge an excessive price to the detriment of consumers”. Sections 1(1)(ix) and 8, South African Competition Second Amendment Act 39 of 2000

discipline high pricing does not necessarily mean that they encompass excessive pricing, given the non-existence of a benchmark to determine excessiveness⁴⁴².

4.3.3.2 Investigating the Islamicity of the practice of excessive pricing

The question that should be raised for the purposes of this chapter: is excessive or unfairly high pricing as such legitimate under *Shari'ah*? Some *may* argue that excessive pricing is legitimate under *Shari'ah* since *prohibited* monopoly therein presupposes that a firm withholds a product for a period of time prior to selling it at high prices, while the factor of 'withholding' does not necessarily exist when a firm prices excessively. In fact, advocates of such view may go further to argue that 'withholding' production or distribution of a product is already tackled under Articles 8(a) and 13 of Law No. 3/2005 and its Executive Regulations respectively⁴⁴³. Thus, a firm may not even get the chance to re-sell the product at inflated prices on the basis that the ECA would intervene to discipline withholding production/distribution of such product. However, this argument seems to be flawed in several respects.

As to the argument that the prohibition of withholding production/distribution of a particular product may somehow preclude firms from setting up high market prices, this approach assumes that market intervention is instantaneous. The fact is that, in practice, competition authorities do not usually intervene in markets immediately once a prohibited practice is committed. In other words, it may take some time for competition authorities, first, to detect the practice in the first place; and second, to conduct various studies and investigative procedures following detection of the practice. This may mean that, until the ECA intervenes to prohibit the practice of withholding distribution, the incumbent may have already sold the products at inflated prices – *prohibited* monopoly under *Shari'ah*.

⁴⁴² Greiss, M. (2010) *op.cit.*, p.26

⁴⁴³ Article 8(a) of Law No. 3/2005 provides that a dominant firm is prohibited from: "Undertaking an act that leads to the *non-manufacturing, or non-production or the non-distribution* of a product for a certain period or certain periods of time". Article 13(a) of the Executive Regulations prohibits a dominant firm from: "Undertaking an act leading to the non-manufacturing, non-production or non-distribution of a product, whether totally or partially, for a certain period or certain periods of time. Period or periods of time shall mean the period or periods of time that suffice to result in the prevention, restriction or harm of the freedom of competition".

Moreover, even if one presupposes that intervention is immediate, increasing prices in itself leads to the limitation of output; pursuant to the *neoclassical* approach of substantial market power (as discussed earlier). In other words, the higher the price a firm sets in a given market, the lower the volume of output that will be supplied to that market. This means that increasing prices will inevitably lead to withholding or limiting volume of output in a manner that would be condemned and prohibited under *Shari'ah*. Even if one disregards these arguments and assumes that raising prices may amount to an “act” under Articles 8(a) and 13(a) of Law No. 3/2005 and its Executive Regulations respectively, and thus caught under these provisions, the practice of excessive pricing in itself explicitly raises the question of *fairness* to societies – an aspect that raises *Shari'ah* concerns.

In fact, it would not be surprising to see how excessive pricing could be condemned under *Shari'ah* from this perspective. Price control is usually guided by two principles under Islamic jurisprudence: First, the *no-harm* principle, and second, the *maslahah* principle⁴⁴⁴. The first criterion is arguably satisfied on the basis that excessive pricing unquestionably generates negative effects and deters consumer welfare, while the second is based on the premise that such a practice favours private interests over the broader scope of public interests that *Shari'ah* initially seeks to accomplish. Having established that the lack of excessive pricing prohibition under Egyptian Competition Law arguably raises Islamic law concerns, the question that follows and remains to be tackled in the following chapter: Does the lack of its prohibition harm or is likely to harm the Egyptian economy?

4.4 THE ABUSE OF MARGIN SQUEEZE

4.4.1 The practice of margin squeeze: Definition and comparison with excessive pricing

Margin squeeze is a practice that takes place when a vertically integrated firm (i.e. a firm that operates at both the upstream (wholesaler) and downstream (retailer) markets) which is dominant in the upstream market sells its input (presumably an essential one)

⁴⁴⁴ See Bashar, M. L. A. (1997) “Price Control in an Islamic Economy” (9), *Islamic Economics*, p.41, as cited in chapter three.

to its downstream competitor at a price that is so high that it disables that competitor from selling it profitably. In this sense, the difference between the cost of the input and its downstream price is minimal and the competitor's profit margin is "squeezed" as a result⁴⁴⁵. To engage in margin squeeze, a vertically integrated firm that is dominant in the upstream market may opt for one of three strategies.

First, it may choose to charge high prices for its input in the upstream in a manner that may disable its rivals from selling profitably and hinders their ability to compete with it in the downstream market - where it is not dominant. Second, the firm may, instead of charging high upstream prices, choose to sell at below-cost prices in the downstream market, yet, overall, attaining profits through its sales in the upstream market⁴⁴⁶. Third, it may choose to both charge its rivals high prices for its upstream input and sell its retail product at low downstream prices. Although margin squeeze by virtue of these strategies may at first sight seem to raise some other abuses⁴⁴⁷ (most notably for the purposes of this thesis: Excessive pricing) in a confusing manner given the prevalence of some similarities, it still varies substantially from them⁴⁴⁸.

Take excessive pricing for instance in comparison with margin squeeze. The first impression of charging an "excessive" upstream price for a given downstream market player is that it lies within the scope of the excessive pricing abuse. In fact, the EU Commission seemed, according to O'Donoghue and Padilla, to confuse margin squeeze with excessive pricing in *Deutsche Telekom* when it indicated that margin squeeze represents an illustration of "imposing unfair selling prices" that is prohibited under

⁴⁴⁵ Alison, J. and Sufrin, B. (2010) "*EU Competition Law – Texts, Cases, and Materials*" Fourth Edition, OUP, p.413; Genevaz, S. (2008) "Margin Squeeze after Deutsche Telekom" Release (1), *Global Competition Policy*, available from: (www.globalcompetitionpolicy.org) accessed 17-11-2010

⁴⁴⁶ It will be argued in part 4.4.3 of this chapter that Egyptian Competition Law does not cover this particular strategy.

⁴⁴⁷ For instance, the second strategy of margin squeeze (above) in particular might seem to bring the scope of predatory pricing and, as such, may appear to be akin to the latter in this respect. However, the two practices have some outstanding differences. For example, while investigating predatory pricing necessitates assessing all of the incumbent's costs, in margin squeeze, it is the price and profit margin attained in the downstream market that counts. Moreover, predatory pricing, in the short-run, is beneficial to consumers, while margin squeeze may or may not be beneficial. For more on these differences, see O'Donoghue, R. and Padilla, A. J. (2006) *op.cit.*, pp.322-323

⁴⁴⁸ Gerardin, D. and O'Donoghue, R. (2005) "*The concurrent applicability of competition law and regulation: The case of margin squeeze abuses in the telecommunications sector*" Global Competition Law Centre, available from: (<http://www.coleurop.org/content/gclc/documents/GCLC%20WP%2004-05.pdf>) accessed 02-11-2010, p.6

Article 102(a) TFEU⁴⁴⁹. This is notwithstanding the fact that the two practices vary in two major ways.

First, margin squeeze is an “exclusionary” abuse that is caught under Article 102(b), while excessive pricing is an “exploitative” abuse that is prohibited under Article 102(a). And, second, the two practices vary in terms of method of investigation. While the benchmark for determining excessive pricing is the incumbent’s own costs of supplying the product at stake in comparison with similar products in the same market, with regards to margin squeeze the price does not become excessive relative to the incumbent’s own costs, but rather in comparison with the price and profit margin as estimated in the downstream market⁴⁵⁰.

4.4.2 The legal treatment of margin squeeze under EU Competition Law

The practice of margin squeeze has not been given much attention in EU practice during the second half of the Twentieth Century. The case law at that stage was quite limited in this regard. The notable case at the time was *British Sugar/Napier Brown* where the EU Commission found that British Sugar had maintained a retail price for its own sugar that could not reflect both repackaging and selling costs and thus its buyer (at the wholesale market), Napier Brown, was unable to effectively compete with it at the retail market⁴⁵¹. However, the post-2000 era experienced a remarkable increase in the number of margin squeeze investigations.

Particularly the surge in the number of cases may be attributed to the liberalization of the telecommunications sector (among other utilities) that was aimed at intensifying the competitive process at the retail level⁴⁵². In fact, the principal case on margin squeeze in the EU so far is in the telecoms market. In *Deutsche Telekom*, the Commission found that Deutsche Telekom had abused its dominant position through forcing a margin

⁴⁴⁹ See O’Donoghue, R. and Padilla, A. J. (2006) *op.cit.*, pp.321-322, citing *Deutsche Telekom AG*, O.J. 2003 L 263/9, para.199

⁴⁵⁰ Ibid; Geradin, D. and O’Donoghue, R. (2005) *op.cit.*, p.13

⁴⁵¹ See Commission Decision IV/30.178, *Napier Brown – British Sugar*, [1988], O.J L. 284/41, [1990] 4 CMLR 196

⁴⁵² Alison, J. and Sufrin, B. (2010) “*EU Competition Law – Texts, Cases, and Materials*” Fourth Edition, OUP, p.414

squeeze on its downstream competitors. More specifically, Deutsche Telekom, a dominant firm in the network access services (local loop access services)⁴⁵³, charged high prices for access to its local loop services to its competitors on the retail market. The Commission found that these prices were higher than those it had charged for its own retail customers (i.e. end-users)⁴⁵⁴.

With regards to the method of determination employed in *Deutsche Telekom*, the Commission indicated that a practice would amount to margin squeeze: “If the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is *negative*, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market”⁴⁵⁵. In this sense, the analogy is that the mentioned *negative* margin (or at the very least, slim margin) is capable of excluding the dominant firm’s downstream competitors; even if they are *as efficient* as the former⁴⁵⁶. The GC upheld the Commission’s decision and concurred with the latter that the dominant firm’s costs and prices should stand as the analogy for discerning margin squeeze⁴⁵⁷.

On appeal, the CoJ upheld the GC and Commission’s decisions on both the method of analysis employed and the findings and indicated that there was no need to exemplify and explain that both wholesale and retail prices of Deutsche Telekom were in themselves abusive. It suffices to demonstrate that the practice of margin squeeze at

⁴⁵³ Note that Deutsche Telekom was also dominant in the retail broadband and narrowband for individual and access customers. However, being dominant in both the wholesale and retail market is not a prerequisite for margin squeeze. It suffices that an incumbent is dominant only in the wholesale market where it sells to its retail market competitors.

⁴⁵⁴ See Commission Decision COMP/C-1/37.451, 35.578, 37.57, *Deutsche Telekom AG*, [2003], O.J. (L.263) 9. Notwithstanding that Deutsche Telekom was subject to access price regulation; it was free to make its own commercial decisions.

⁴⁵⁵ *Ibid*, para.107

Arguably the first part of this definition – particularly where it stresses that the relationship between wholesale and retail prices is *negative* - appears to cover the three strategies which a dominant firm may resort to while squeezing the margins of its competitors (as highlighted in the preceding part). This contrasts with the Egyptian legal treatment of margin squeeze (as will be discussed in the following part) that appears to lack a prohibition of the below-cost margin squeeze strategy.

⁴⁵⁶ *Ibid*, para.108

Note that this test was also employed in *Napier Brown/British Sugar*.

⁴⁵⁷ Case T-271/03, *Deutsche Telekom AG v. Commission*, [2008], E.C.R. II-477

Note that the opinion of AG Jan Mazák dated 22nd April 2010 entirely supported the GC’s Judgment in this case.

stake was capable of driving its (*as efficient*) competitors out of the market in a manner that would strengthen its dominant position and, as a result, harm consumers by limiting their choices⁴⁵⁸. The CoJ also added that this might undermine consumers' long-term gains that derive from the conceivable decrease in retail prices for end-user access (as an outcome of distorted competition)⁴⁵⁹.

In yet another interesting case, the Commission in *Wanadoo España v. Telefónica* found that Telefónica, a dominant firm in regional and national markets for wholesale broadband access, had abused its dominant position by squeezing the margin of its competitors; even though it was subject to a sector-specific regulation that provides it to weigh interests and promote downstream competition and consumer welfare through supplying wholesale services. Particularly, the Commission held that, given its high wholesale prices, Telefónica's downstream competitors could not have equated their retail prices for Internet access without loss. The Commission employed the same test as that of *Deutsche Telekom* (the equally efficient standard) to conclude that the practice had distorted competition and undermined the ability of competitors to enter and exit the market; all of which had affected end-users⁴⁶⁰.

In *Konkurrensverket v TeliaSonera*, AG Mazák interestingly suggested that margin squeeze might appear in the form of "constructive" refusal to deal. More specifically, he stated that: "One particular manifestation of a refusal to deal occurs in the case of an abusive margin squeeze (or 'constructive refusal to deal') where, instead of refusing entirely to supply the essential/indispensable input in question, the dominant undertaking supplies the input to its competitors on the downstream market at a price which does not enable those competitors to compete effectively on the downstream market". In fact, he argues that the concern and effects of both refusal to supply and margin squeeze is virtually identical; that is the distortion of competition in the downstream market (as EU case law suggests)⁴⁶¹.

⁴⁵⁸ It will be argued later on in chapter five in favour of adopting this *as efficient* standard in relation to settling margin squeeze disputes under Egyptian Competition Law

⁴⁵⁹ Case C-280/08 P, *Deutsche Telekom AG v. Commission*, Judgement dated 14th October, 2010, paras.181-182

⁴⁶⁰ Commission Decision COMP/38.784, *Wanadoo España v. Telefónica*, [2008], O.J C. 83/05

Indeed, AG Mazák’s line of thinking derives from the EU Commission’s Guidance where margin squeeze was linked with refusal to deal. Specifically, it indicated under Section (D) entitled “Refusal to Supply and Margin Squeeze” that for a refusal to deal practice to be prohibited, it need not be explicit, but could rather appear in the form of “constructive” refusal to deal through, for instance, the “imposition of unreasonable conditions in return for the supply”. In particular, the Commission stated that: “Instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis”. In such event, for a prohibition under Article 102 TFEU, the Guidance provides the satisfaction of three pre-requisites: first, the refusal pertains to an “objectively necessary” product/service for competition in the downstream market; second, the likelihood of eliminating “effective” downstream competition, and; third, the likelihood of causing harm to consumers⁴⁶².

4.4.3 The legal treatment of margin squeeze under Egyptian Competition Law

At the outset, it is imperative to note that for a legal provision that is intended to prohibit the practice of margin squeeze, it should, at the very least, contain its basic pre-requisites⁴⁶³. First, the practice is exercised by a vertically integrated firm that is dominant in the upstream market; second, the practice concerns an essential product, and; third, the vertically-integrated dominant firm’s pricing is capable of eliminating *as efficient* competitors in the downstream market⁴⁶⁴. Given the necessity of satisfying these conditions cumulatively, the question that should in turn be raised in this respect: Does Egyptian Competition Law cover these pre-requisites?

⁴⁶¹See Opinion of Advocate-General Mazák dated 2nd September 2010 in Case C-52/09 *Konkurrensverket v TeliaSonera*, Sweden, para.16. Arguably the margin squeeze practices in *British Sugar*, *Deutsche Telekom* and *Telefónica* (as discussed above) amounted to *constructive* refusal to supply since upstream prices in these cases were high.

⁴⁶² EU Commission’s Guidance, paras.79-81

⁴⁶³ This should specifically be the case in civil law traditions like Egypt where legislation remains the major source. In the EU, on the other, Article 102 TFEU does not contain the required criteria for prohibition of margin squeeze. These were rather recognized by the case law.

⁴⁶⁴ Note that these conditions derive from the definition of margin squeeze as highlighted in part 4.4.1 and EU case law as discussed in part 4.4.2 of this chapter. On this, see also O’Donoghue, R. and Padilla, A. J. (2006) *op.cit.*, pp.309-321

Article 13 of the Executive Regulations, at first sight, seems to recognize *constructive* refusal to deal within the framework identified by AG Mazák in *Konkurrensverket v TeliaSonera*. Particularly, Article 13(b) prohibits a dominant firm from: “Refraining from entry into sale or purchase transaction regarding a product with any person or totally ceasing to deal with it in a manner that results in *restricting that person's freedom to access or exit the market at any time, which includes imposing financial conditions or obligations or abusive contractual conditions or conditions that are unusual in the activity subject matter of dealings*. Refraining from entry into transactions with any person or totally ceasing to deal with it shall not be prohibited if justified on the basis that this Person does not have the ability to fulfil its obligations arising from the contract”⁴⁶⁵.

Closer insights, however, *may* suggest that Article 13(b) as such is merely restricted to refusal to deal in its ordinary form and may not encompass margin squeeze. This is based on two grounds. First, the wording of the provision seems to be confined to the event where the dominant firm offers its input at high (wholesale) prices but the buyer (or retailer) does not accept these terms. Second, assuming that the provision provides that the concerned dominant firm is vertically integrated (i.e. also operates in the downstream market; other than the upstream market where it is dominant) – although this is not explicit - it does not require the input to be *essential* for the downstream market or competition therein⁴⁶⁶.

Nonetheless, construing Article 13(b) from a very broad yet prudent perspective suggests that *constructive* refusal to deal (or margin squeeze) within the framework discerned by AG Mazák is covered by it. This could be premised on three assumptions. First, Article 13(b) could be read as implicitly providing that the dominant firm in the upstream market also operates in the downstream market (i.e. vertically integrated). Second, the term “product” that is stipulated under Article 13(b) is very general and, hence, could be read to cover the intended *essential* input. And third, Article 13(b)

⁴⁶⁵ Article 13(b), Executive Regulations

⁴⁶⁶ In fact, Article 13(b) in relation to the term “product” does not seem to be as explicit as, for instance, Article 13(f) which prohibits a dominant firm from: “Refraining, whether totally or partially, from producing or providing *a product that is circumstantially scarce* in the market when its production or provision is economically possible”.

could signify that the practice is prohibited if it *restricts* the concerned (retailer's) *freedom to enter or exit the market* (or indeed excludes it from the market).

Based on the foregoing assumptions, one may submit that *constructive* refusal to deal (or margin squeeze). However, the treatment of margin squeeze under Egyptian Competition Law remains insufficient to cover *all* the likely strategies that a vertically integrated firm may resort to. Neither the Law No. 3/2005 nor its Executive Regulations seem to recognize that the practice of margin squeeze does not always appear in the form of refusal to deal. In other words, they do not address margin squeeze in other circumstances; or that are otherwise not in the form of refusal to deal. This may indeed be explained by the fact that the abusive practices stipulated under Egyptian Competition Law are provided on an *exhaustive* basis.

To this end, a vertically-integrated firm that is dominant in the upstream market may strategically choose to charge its downstream competitors ordinary (or not *unusual*) wholesale prices so as to avoid the application of Article 13(b) but then accept to sell its product at the retail market at below-cost prices and, as a result, squeeze its competitors' prices (primarily for exclusionary purposes)⁴⁶⁷. However, this vitally presupposes that the firm at stake is not dominant in the downstream market (aside of its dominance in the upstream market)⁴⁶⁸; otherwise, it may risk being caught under Article 13(e) of the Executive Regulations as pricing below marginal or average variable costs (predatory pricing)⁴⁶⁹. The question that should then follow for the purposes of this thesis: Is

⁴⁶⁷ See discussion in part 4.4.1 on the three strategies to which a vertically integrated dominant firm may resort to in relation to margin squeeze.

⁴⁶⁸ Although it will be argued (and evidenced) in chapter five that the Egyptian market in general is highly concentrated, this does not mean that a firm would always be dominant in both upstream and downstream markets. In other words, concentration may also prevail on a chain-by-chain basis.

⁴⁶⁹ Predatory pricing may be defined as: "Short-run conduct which seeks to exclude rivals on a basis other than efficiency in order to protect or acquire market power. Such exclusion can be attempted through short-run pricing so low as to induce exit or deter entry". See OECD Report (1989) "*Predatory Pricing*" available from: (<http://www.oecd.org/dataoecd/7/54/2375661.pdf>) accessed 30-11-2010

According to Article 13(e) of the executive regulations "Marginal cost shall mean the share of one unit of a given product from the total costs within a certain period of time. The variable cost shall mean the cost which changes with the change in the volume of products provided by the person during a certain period of time".

The EU system on the other hand seems to apply a relatively different approach. In *Akzo*, the CoJ ruled that

pricing below-cost condemned under *Shari'ah* - even though not tackled in this particular circumstance by Article 13(b)?

4.4.4 Investigating the Islamicity of the treatment of margin squeeze under Egyptian Competition Law

Having assumed that the Egyptian legislator seems to have missed the event where a vertically-integrated dominant firm decides to squeeze prices of its downstream competitors in the downstream market (where it is presumably not dominant) through selling at below-cost prices; rather than in the upstream market (where it is dominant) and may be caught under Article 13(b) of the Executive Regulations, it is indispensable to discern the Islamicity of such omission. This provides evaluating the likely effects of below-cost pricing on the society in light of the definition of *prohibited* monopoly and the guiding principles of market intervention under *Shari'ah*.

While it is argued that the practice of excessive pricing, on the one hand, complies with the definition of *prohibited* monopoly under the *Shari'ah* in the sense that increasing prices, in itself, limits the volume of output, below-cost pricing, on the other hand, does not seem to be directly tackled under this definition. Particularly, pricing below-cost is not addressed in a direct manner (it is rather pricing above market prices that is mentioned). Although not sufficiently addressed in the literature, this form of pricing raises significant debate among the Islamic jurisprudence. In a *Hadith* reported by Al-Hakim Al-Nisaboury: The Prophet came across a person who sells food with a price that is cheaper than market prices; so he asked him: "Do you sell in our market with a price that is cheaper than ours?" the person replied: "Yes". The Prophet then preached him and said: "The fetcher to our market is like the *mujahid* for the sake of God; and the monopolist in our market is an atheist in the Book of God"⁴⁷⁰.

pricing below average variable costs by dominant firms tend to eliminate competitors and as such must be presumed as abusive. Prices above average variable costs but below average total costs are abusive only if they comprise "part of a plan to eliminate a competitor". Prices above average total costs are not abusive. See Case C-62/86, *Akzo Chemie v. Commission*, [1991] E.C.R. I-3359, paras.70-72

⁴⁷⁰ Hadith reported by Al-Hakim Al Nisaboury, 12/2, *Kitab Al—Biyu'* (Book of Sales), as cited by EL-Din, M. M. S. (1997) "*Al-Ihtikar fi Al-Shari'ah Al-Islamia*" (Monopoly in Islamic *Shari'ah*), International Institution for Studies and Publication (Beirut, Lebanon) [Book in Arabic], pp.245-246

The debate of pricing below market prices was given some attention in Islamic jurisprudence. The Malikis line of thought argues that the seller should take into account market prices in relation to weighable food or non-food products. As for other non-weighable commodities, the seller does not need to take into consideration prevailing market prices. The Shafei, on the other hand, take a more liberal stance in this respect. They believe that no one is entitled to prevent a person from selling below market prices⁴⁷¹.

Although these approaches (generally speaking) seem to preclude the possibility of market intervention in relation to low prices, they appear to premise these views on several assumptions. First, the seller in question operates only in one market (i.e. is not vertically integrated). Even if it is assumed that the seller is also active in another subsequent market, dominance is not assumed in the latter market. Second, the seller merely sells at below market prices in general and not necessarily below-costs; and third but not least; the seller has good intentions in relation to selling below market prices. These assumptions are indeed not applicable to the event at stake.

Furthermore, it is imperative to note that intentions (“*Al-Niyyat*”) in Islam play a substantial role. According to the Prophet “Actions are defined by intentions”⁴⁷². Arguably, this means that while discerning whether or not a practice should be condemned, the intentions of the person who commits it are taken into consideration⁴⁷³. In this sense, it may be argued that a vertically integrated dominant firm that intends to exclude its downstream rivals through squeezing their margins by setting its prices at below-cost may be condemned under *Shari’ah*, since it conveys an exclusionary intent. However, as discussed in the preceding chapter, market intervention/price control is generally guided by two factors: First, the principle of *no-harm* and, second, the principle of *maslahah*⁴⁷⁴. Is a practice as such capable of satisfying these factors?

⁴⁷¹ EL-Din, M. M. S. (1997) “*Al-Ihtikar fi Al-Shari’ah Al-Islamia*” (Monopoly in Islamic *Shari’ah*), International Institution for Studies and Publication (Beirut, Lebanon) [Book in Arabic], pp.246-247

⁴⁷² For a detailed discussion on the role of intentions in *Shari’ah*, see Powers, P. R. (2005) “*Intent in Islamic Law – Motive and Meaning in Medieval Sunni Fiqh*” First Edition, Brill, Netherlands, pp.4-5

⁴⁷³ Indeed the factor of intention in the case of exploitative or excessive pricing is also present. The difference clearly is that one intends to exploits consumers (excessive pricing), while the other intends to foreclose competitors (margin squeeze).

⁴⁷⁴ See particularly part 3.3.4 (chapter three).

Undeniably, the concerned practice is capable of excluding the vertically integrated dominant firm's downstream competitors and, as such, may arguably fulfil the principle of *no-harm*. Where, however, the controversy could arise is in relation to the principle of *maslahah* which essentially weighs private with public interests and favours the *greater interest*. While, as indicated above, the concerned practice is capable of harming competitors by way of excluding them from the market, it concurrently benefits consumers who get to buy the product at below-cost prices. In this sense, one may suggest that consumers (and competitors in this case) represent the *greater interest* to which *Shari'ah* should be concerned with and, as such, the lack of prohibition of this practice may not raise any Islamic law concerns.

Nevertheless, this argument could reasonably be countered for two reasons. First, these below-cost prices will last only for a temporary period and thus, what consumers will benefit from could be outweighed by what they could lose in the long-run (e.g. lack of choice, likely high prices). Second, similar to the exploitative practice of excessive pricing, below-cost pricing raises *fairness* concerns (aside of the issue of intentions)⁴⁷⁵; which is indeed in itself one of the cornerstones of *Shari'ah*. In fact, the latter suggestion (arguably) finds support by Imam Ibn Taimiyah who indicated that where market price "Is not fixed at a reasonable level to fulfil the need of the great public by the operation of normal principles of marketing, then the price should be fixed for the welfare of the people *with justice, neither more nor less*"⁴⁷⁶. To this end and given the foregoing, one may argue that the lack of comprehensive prohibition of margin squeeze under Egyptian Competition Law raises Islamic law concerns. Does this effect, however, extend to the degree that the lack of such treatment may hinder Egyptian economy in the future?

⁴⁷⁵ Nonetheless, the difference between excessive pricing and below-cost pricing (margin squeeze) is that while the former raises total welfare concerns, the latter is merely concerned with excluded competitor(s).

⁴⁷⁶ Imam Ibn Taimiyah "*Al-Hisba Fil Islam*" p.37, as cited by Dabbah, M. M. (2007) "*Competition Law and Policy in the Middle East*" First Edition, CUP, pp.25-26

4.5 THE METHOD FOR ANALYSIS OF ABUSE OF DOMINANCE UNDER EU AND EGYPTIAN COMPETITION LAWS

4.5.1 Modernizing Article 102 TFEU

As highlighted in the preceding chapter, the EU Commission expressed an intention to move towards an effects-based approach. There are major differences between form-based approaches to competition law that are (arguably) supported by Ordoliberals and effects-based analysis. The former approach was subject to substantial criticism; particularly from the EAGCP⁴⁷⁷. Particularly, the notion of abuse of dominance in the style applied by the Commission was challenged on the basis of its protection of competitors of an incumbent instead of the competition process itself - which should have inherently been the ultimate goal of competition law. The Commission, according to the EAGCP, wrongly focuses on whether or not any of the prohibited conducts under Article 102 TFEU were committed irrespective of any anticompetitive harm thereby⁴⁷⁸. However, having said that the Commission showed interest in such modernized approach, it is indispensable to review the numerous underlying debates that stem from this method and discern whether it is envisaged in practice.

It is debatable whether or not, by employing an effects-based approach to Article 102 TFEU, the dominance test should be dropped from the appraisal. The EAGCP go as far to suggest that the dominance test should be dropped in the event of proving harm to competition on the basis that this latter may inherently imply dominance. More specifically, the EAGCP mentioned that: “In contrast to a form-based approach, an effects-based approach needs to put less weight on a separate verification of dominance [...] if an effects-based approach yields a consistent and verifiable account of significant competitive harm that in itself is evidence of dominance”⁴⁷⁹. This argument may nevertheless be countered on the basis that it may lead to “excess intervention” – a counter-argument that may overlap with the Ordoliberal theory of intervention⁴⁸⁰.

⁴⁷⁷ Concurrently, however, effects-based approaches were heavily criticized on several grounds. Recall the discussion on arguments for and against this form of analysis in part 3.2.6 (chapter three).

⁴⁷⁸ See Gual, J., Hellwig, M., Perrot, A., Polo, M., Rey, P., Schmidt, K. and Stenbacka, R. (2005), Report by the Economic Advisory Group for Competition Policy “*An Economic Approach to Article 82*” available from: (http://www.shh.fi/~stenback/eagcp_82_2005_july_21.pdf) accessed 14-06-2008

⁴⁷⁹ Ibid, p.4

As Majumdar notes, the feasibility of an effects-based approach depends to a large extent on the potency of the evidence of detrimental effects on competition and consumers. It is not sufficient to prove that the abusive practices at stake are “capable” of distorting competition. This must be accompanied by verification that this effect is viable in the first place. This verification would initially be obtained through an assessment of market power. Hence, crossing out the dominance test and moving immediately to an evaluation of anti-competitive effects may constitute an unreliable finding; given that all market players may be deterred from the practice of the non-dominant firm. Offering discounts, for instance, is capable of providing anti-competitive effects to all market players – though effect may vary in terms of degree; depending on each player’s position in that market⁴⁸¹.

However, the EU Commission seems to have neglected the EAGCP’s argument on dropping or at least minimizing the degree of reliance on dominance appraisal. In its Discussion Paper, it incorporated a whole section on ‘dominance’⁴⁸². Nonetheless, in its Guidance, the Commission interestingly suggested that the “less efficient competitor” of a dominant firm might still pose anti-competitive constraints. Precisely, it stated that: “A less efficient competitor may also exert a constraint which should be taken into account when considering whether a particular price-based conduct leads to anticompetitive foreclosure”⁴⁸³. However, this does not entail that the Commission had dropped the dominance test as a result of the initiative to employ an effects-based approach. On the contrary, the Guidance covers a specific and detailed part entitled ‘market power’⁴⁸⁴.

Among the controversial questions that should indeed be addressed for the purposes of determining the scope of analysis within the context of exclusionary abuses under Article 102 TFEU: What does EU Competition Law aim to protect? Is it the process of competition, competitors or consumers that is given much attention? In relation to its

⁴⁸⁰ Majumdar, A. (2006) “Whither Dominance” (4), *European Competition Law Review*, Sweet and Maxwell, p.163

⁴⁸¹ Ibid.

⁴⁸² See EU Commission’s Discussion Paper, Section (4)

⁴⁸³ EU Commission’s Guidance, para.24

⁴⁸⁴ Ibid, Section III (A)

treatment of exclusionary abuses in general, the Commission primarily aims to prevent abuses that cause harm to end users/consumers. In its Discussion Paper, it stated that: “The *central concern* of Article [102] with regard to exclusionary abuses is thus foreclosure that hinders competition and thereby harms consumers”⁴⁸⁵. In this sense, the protection of the competition process is perceived as means for protecting consumer welfare.

This was indeed confirmed by the case law. According to AG Kokott in *British Airways*: “Article [102 TFEU], like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, *but to protect the structure of the market and thus competition* as such (as an institution), which has already been weakened by the presence of the dominant undertaking on the Market”⁴⁸⁶. On a more recent occasion, referring to its judgement in *Sot. Lélos kai Sia E.E v Glaxosmithkline AEVE Farmakeftikon Proïonton*, the CoJ in *Deutsche Telekom* stated that: “Article [102 TFEU] aims, in particular, to protect consumers by means of undistorted competition”⁴⁸⁷.

For the purposes of protecting competition as a *means* for enhancing consumer welfare as such, the Commission indicated that while determining whether or not an exclusionary practice is abusive, it will consider the effects of such a practice on the exclusion of a competitor who is “as efficient” as the dominant firm. Particularly, in its Guidance, it uses the terminology: “Anticompetitive foreclosure” to which it defines as: “A situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers”⁴⁸⁸.

⁴⁸⁵ See EU Commission’s Discussion Paper, para.56, emphasis added

⁴⁸⁶ See Opinion of Advocate-General Kokott, Case C-95/04, P *British Airways v. Commission* [2007] E.C.R. I-2331, para.68, emphasis added

⁴⁸⁷ Case C-280/08 P, *Deutsche Telekom AG v. Commission*, Judgement dated 14th October, 2010, para.180

⁴⁸⁸ EU Commission’s Guidance, para.19

In this sense, the Commission's approach of analysis is divided into two stages; foreclosure and consumer harms. Some, however, contest the first stage of analysis on the basis of uncertainty. For instance, according to Petit, the problem that arises in the Commission's approach is the lack of clarity pertaining to the volume of foreclosure that would necessitate intervention. Nevertheless the Guidance becomes clear when it stresses that not all forms of foreclosures are subject to intervention. For instance, with regards to pricing abuses, it indicated that foreclosure that would necessitate intervention is that which affects competitors who are "as efficient" as the incumbent in question – yet in limited situations a competitor who is "less efficient" may impose a "competitive constraint" on such incumbent (as indicated earlier)⁴⁸⁹. With respect to consumer harm, the Commission seems to set such harm as an analogy for determination of whether or not the abusive conduct at stake is anti-competitive. In fact, the Guidance stresses that harm is caused in the event where a dominant: "Is likely to be in a position to profitably increase prices, to the detriment of consumers". This seems to happen as a result of foreclosing a competitor(s)⁴⁹⁰.

Given the foregoing, the Commission seems to fairly uphold the EAGCP's proposal of an effects-based approach to Article 102 TFEU. In fact, former Commissioner Kroes believes that the aim of the post-2005 line of thinking in relation to the implementation of Article 102 TFEU is threefold. First, is to ensure that intervention takes place only when there is need for it to protect "business" and "consumers". Second, there is a need to circumvent "false positives" (i.e. type II errors). According to Kroes, one should not undervalue "over-enforcement" – given its very likely detrimental effects, not only on dominant firms initially at stake, but also their customers as well as the future behaviour of other dominant firms. Third, is to provide "democratic accountability" to the public, aside of "legal certainty"⁴⁹¹.

⁴⁸⁹ Petit, N. (2009) "From formalism to effects? – The Commission's Communication on Enforcement Priorities in Applying Article 82 EC" available from:

(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476082) accessed 20-12-2009, pp.4-5; EU Commission's Guidance, paras.23-24

⁴⁹⁰ See Petit (2009), *op.cit.* p.8; EU Commission's Guidance, para.19

⁴⁹¹ Kroes, N. (2008) "The European Commission's Enforcement Priorities as regards Exclusionary Abuses of Dominance – Current Thinking" 3(4), *Competition Law International*, Journal of the Antitrust Committee of the International Bar Association, [October 2008 issue], pp.4-5

The imperative question, however, lies in whether or not such effects-based approach initiative is operative in EU practice. If so, is it the *actual* or *likely* anti-competitive effects that matter? In *British Airways v. Commission*, the GC took no notice of anti-competitive effects whilst merely relying on former case law. More specifically, the GC stated that: “In the first place, for the purposes of establishing an infringement of Article [102], *it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned*. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is *capable* of having, or *likely* to have, such an effect”⁴⁹². Despite BA’s appeal on the basis of not taking into account the “probable effects” from the part of the GC, the CoJ merely upheld the GC’s decision⁴⁹³.

Furthermore, the GC in *France Telecom SA v. Commission* denied the necessity of identifying actual anti-competitive effects of the claimed predatory pricing or, at least, as evidence of hindrance of the competitive process – an approach that (arguably) coincides with the Ordoliberal perspective in terms of intervention. It stated that: “For the purposes of applying that article, *showing an anti-competitive object and an anti-competitive effect may, in some cases, be one and the same thing. If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect*”⁴⁹⁴. However, the *British Airways* and *France Telecom* judgments do not provide the whole picture.

AG Colomer in *Sot. Lélos kai Sia E.E v Glaxosmithkline AEE Farmakeftikon Proïonton* provided an interesting opinion that more or less reflects the Commission’s modernization agenda. He suggests that employing a formalistic approach does not in fact take into account consumers’ interests. On the contrary, these interests may not be accomplished except through a study of actual effect of the practices at stake. Moreover, according to him, Article 102 TFEU should not be read so as to mean that abusive conducts are prohibited *per se* even in the case of outstanding “anticompetitive effect”

⁴⁹² Case T-219/99, *British Airways v. Commission*, E.C.R. II-5917, [2004] 4 CMLR 19, para.293

⁴⁹³ See Case C-95/04, *British Airways v. Commission* [2007], E.C.R. I-2331, paras.96-98

⁴⁹⁴ Case T-340/03, *France Telecom SA v. Commission* [2007] ECR II-107, para.195

and “intent”⁴⁹⁵. However, the CoJ did not embrace this opinion or even make reference to it, arguably premising its analysis and reasoning instead on a “formalistic” (or Ordoliberal) approach⁴⁹⁶.

The Commission, nevertheless, in some cases, arguably appears to employ a *less* formalistic (or *per se*) approach. In *Telefónica*, the Commission indicated that the firm’s practice distorted competition. Specifically, it stated that: “The margin squeeze *restricted* competition by imposing unsustainable losses on equally efficient competitors: they were either ultimately forced to exit or in any event constrained in their ability to invest and to grow. Even if they met Telefónica both on prices and marketing expenditure, they were poorly placed in the long run to offer a vigorous competitive challenge to Telefónica as a result of their continuing losses. As a result, Telefónica’s conduct was likely to delay the entry and growth of competitors”⁴⁹⁷. Although the Commission appeared to have merely looked at the *likely* effects on competition, it investigated some *actual* effects on consumers. For instance, it held that that consumer welfare was deterred since retail prices in Spain were highest compared to other relevant EU states⁴⁹⁸.

Even more recently, the Commission in *Intel* appears to have analyzed the effects of the latter’s rebates practices on the foreclosure of competition and consumer welfare. Particularly, it held that Intel’s conditional rebates and payments had attracted five well-established equipment manufacturers (Dell, IBM, HP, Acer and NEC); along with a major retailer and found that the *actual* effects were significant in that they substantially undermined competitors’ ability to compete on the merits of their x86 CPUs. It also reached a finding, in light of the foregoing, that Intel’s anticompetitive conduct led to the reduction of consumer choice and generated lower incentives to innovate⁴⁹⁹.

⁴⁹⁵ See Opinion of Advocate-General Colomer, 1st April 2008 in Case C-468/06 – 478/06, *Sot. Lélos kai Sia E.E v Glaxosmithkline AVEE Farmakeftikon Proïonton*, [2008] E.C.R. I-7139, paras.70-75, 123

⁴⁹⁶ Reflecting on AG Colomer’s opinion, see Ezrachi, A. (2009) “The Commission’s Guidance on Article 82 EC and the effects based approach – Legal and practical challenges” Ezrachi, A. (Ed.), *Article 82 EC: Reflections on its Recent Evolution*, Hart Publishing, p.59

⁴⁹⁷ Commission Decision COMP/38.784, *Wanadoo España v. Telefónica*, [2008], O.J C. 83/05, para.8

⁴⁹⁸ *Ibid*, para.544

⁴⁹⁹ See Commission Decision COMP/C-3/37.990, *Intel* [2010] 4 CMLR 314

However, EU Courts still show some reluctance in employing a *full* effects-based approach [as *British Airways* and *France Telecom* (above) exemplify]. Indeed the Commission's power to reform Article 102 TFEU in practice is not unlimited. The Commission highlighted this matter in its Guidance when it stated that while construing the terms of Article 102 TFEU: "It is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 82 by the European Court of Justice and the Court of First Instance"⁵⁰⁰. In fact, Ezrachi argues that a precept as such may restrict the Commission's plan to employ an effects-based approach to Article 102 TFEU irrespective of the scope or framework adopted by EU case-law; otherwise it may be vulnerable to a court action⁵⁰¹.

As indicated in the preceding chapter, the Commission and Courts do not preclude that prohibition of abusive practices within the scope of Article 102 TFEU may be escaped by means of objective justification. EU Courts initially suggested the notion of objective justification. In *Centre Belge Détudes de Marché Télémarketing v. CLT* regarding refusal to supply, the CoJ indicated that an infringement to Article 102 TFEU might be justified by way of 'objective necessity'⁵⁰². In *Tetra Pak*, the CoJ upheld the GC and Commission decisions that denied Tetra Pak's allegation that its tying practice was essential for the purposes of aspects such as health protection⁵⁰³. In the same vein, in *Tomra*, the GC upheld the Commission's rejection of Tomra's claims that its exclusive agreements and system of rebates was objectively justified⁵⁰⁴.

A further means of defence within the context of Article 102 TFEU is the protection of a dominant firm's 'commercial interests'. This form is also known as the 'meeting

For commentary on the Commission's analysis in *Intel*, see DeGraba, P. and Simpson, J. (2010) "Theories of Harm in the Intel Case" available from: (<http://ssrn.com/abstract=1705753>) accessed 03-12-2010

⁵⁰⁰ See EU Commission's Discussion Paper, para.6; Guidance, para.3

⁵⁰¹ See Ezrachi, A. (2009) "The European Commission Guidance on Article 82 EC – The Way in which Institutional Realities Limit the Potential for Reform" available from: (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463854) accessed 20-11-2009, pp.16-17

⁵⁰² Case 311/84, *Centre belge détudes de marché Télémarketing v. SA Compagnie luxembourgeoise de télédiffusion*, [1985], E.C.R.3261, [1986] 2 CMLR 558, para.26

Note that the Commission's Discussion Paper and Guidance both recognize objective necessity.

⁵⁰³ Case 333/94, *Tetra Pak International SA v. Commission*, [1996] E.C.R. I-5951, [1997] 4 CMLR 662, para.37

⁵⁰⁴ See Case T-155/06, *Tomra v. Commission*, Judgment of the General Court dated 9th September, 2010, paras.311-314

competition’ defence. However, the Commission and Courts, similar to ‘objective necessity’, seem to envisage this form of defence from a very rigorous perspective; if at all. For instance, the GC in *France Telecom* indicated that: “According to established case law, although the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked and such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it”⁵⁰⁵. In fact, the Commission, after previously discussing it in its Discussion Paper, seems to have left it out from the Guidance⁵⁰⁶.

The final form of defence that may be invoked before the Commission and Courts is ‘efficiency defence’; that is to inquire about whether or not the abusive practice at stake may be justified from an efficiency point of view. In *British Airways*, the CoJ did not exclude the possibility that BA’s practice could be justified. It stated that: “It then needs to be examined whether there is an objective economic justification for the discounts and bonuses granted [...] an undertaking is at liberty to demonstrate that its bonus system producing an exclusionary effect is economically justified”⁵⁰⁷. However, the Commission seems employ very high standard in relation to efficiency defences⁵⁰⁸.

To this end, and given the foregoing treatment of the effects-based approach initiative in practice, one may argue that although the Commission had shown (on some occasions) some signs that it intends to employ such approach, EU Courts, until today, do not seem to endorse that initiative. Arguably it is only in rare circumstances (if at all) when EU Courts and Commission do analyse the *actual* effects of abusive practices on competition and consumer welfare. The standard seems to rather rely on *likely* or *potential* effects of these practices.

⁵⁰⁵ Case T-340/03, *France Telecom SA v Commission*, [2007], 4 CMLR 21, para.185

⁵⁰⁶ EU Commission’s Discussion Paper, paras.81-83

⁵⁰⁷ Case C-95/04, *British Airways v. Commission* [2007], E.C.R. I-2331, para.69

⁵⁰⁸ For instance, see Commission Decision COMP/C-3/37.990, *Intel* [2010] 4 CMLR 314, para.1624. For discussion on this (high) standard, see Geradin, D. (2009) “*The decision of the Commission of 13 May 2009 in the Intel case: Where is the foreclosure and consumer harm?*” available from: (http://www.intel.com/pressroom/legal/docs/Damian_paper.pdf) accessed 27-11-2010, p.21

4.5.2 Articles 8 and 13 of the Law No. 3/2005 and Executive Regulations: A space for an effects-based approach?

At the very outset, an important question that should be raised: What interests does Egyptian Competition Law seek to protect? Is it competitors, competition, and/or consumers? The ECA's former Executive Director stated that: "Competition is not a goal in itself but rather a means for *making markets work better for consumers*"⁵⁰⁹. This entails that the ultimate concern seems to be consumer welfare. However, similar to what the EU system provides or arguably inspired by its approach, the ECA perceives that consumer welfare may not be attained without ensuring that the process of competition is not properly safeguarded. In this sense, an effects-based approach in relation to the implementation of abuse of dominance would focus on the effects of abusive conducts on the competitive process and consumers, as a result.

Article 8 of Law No. 3/2005 prohibits a dominant firm from exercising any of nine abuses. The approach for the appraisal of these abuses is stipulated primarily under the Executive Regulations. However, the approach does not seem to be consistent under Egyptian Competition Law. While Article 13 of the Executive Regulations provides for an effects-based approach to some abuses, it left it open for investigating authorities to choose between a *per se* approach or effects-based analysis in relation to other abuses. This seems to depend on whether or not the practice in question has no other purpose but to restrict competition or that may otherwise be objectively justified⁵¹⁰. Unlike the EU system, however, Egyptian Competition Law does not seem to categorize the objective justification defences that a dominant firm may invoke. Nonetheless, this does not mean that firms may not justify their conduct(s). On the contrary, the law seems to have left it for accused dominant firms to justify their practices according to the circumstances.

Generally speaking, the Egyptian legislator has required an effects-based approach to the majority of abuses prohibited under Article 8 of the Law No. 3/2005. It should be

⁵⁰⁹ Attia, K. (2009) "Introducing Competition Law and Policy - The Case of Egypt" (1), *Mediterranean Competition Bulletin*, available from:

(<http://ec.europa.eu/competition/publications/mediterranean/index.html>) accessed 11-10-2009, p.18

⁵¹⁰ Greiss, M. (2010) *op.cit.*, p.26

stressed however that, unlike most of the EU case law, the wording of Egyptian Competition Law (as will appear) seems to necessitate an *actual* effects standard in relation to abuses that require an effects-based approach. In other words, it does not suffice for ECA and Courts to find that the abusive practices under scrutiny are *likely* to have an anti-competitive effect (otherwise, this may arguably raise constitutional concerns). Indeed this reflects the principle of *no-harm* that is required by the *Shari'ah* for market intervention purposes. It is questionable, however, whether investigating authorities do in fact employ such rigid standard in practice.

Prohibiting a dominant firm from “Undertaking an act that leads to the non-manufacturing, or non-production or the non-distribution of a product for a certain period or periods of time” is decided by virtue of an effect-based approach⁵¹¹. This may be envisaged from the wording of Article 13(a) of the Executive Regulations: “*Period or periods of time shall mean the period or periods of time that suffice to result in the prevention, restriction or harm of the freedom of competition*”⁵¹². This entails that exercising a practice that limits the manufacturing, production or distribution process for a period of time in itself is not adequate for a dominant firm to be caught under Article 8(a). The ECA is required to prove that exercising such conduct during the period of time in question has distorted competition in the relevant market⁵¹³.

The same approach seems to be required in relation to refusal to deal (or *constructive* refusal to deal) abuses. A dominant firm is not caught under Article 8(b) of Law No. 3/2005 unless its “Refraining from entry into sale or purchase transactions regarding a product with any person or totally ceasing to deal with him” leads to: “*Restricting that person’s freedom to access or exit the market at any time [...]*”⁵¹⁴. In this sense, any dominant firm that refuses to deal with another firm – whether this concerns sale or purchase of a product – shall not be caught under Article 8(b) unless such refusal undermines that firm’s ability to enter or exit the relevant market⁵¹⁵.

⁵¹¹ Article 8(a), Law No. 3/2005

⁵¹² Article 13(a), Executive Regulations

⁵¹³ Greiss, M. (2010) *op.cit.*, p.26

⁵¹⁴ Article 8(b), Law No. 3/2005

⁵¹⁵ Greiss, M. (2010) *op.cit.*, p.26

Articles 8(c) of Law No. 3/2005 prohibits a dominant firm from: “Undertaking an act that limits distribution of specific product, on the basis of geographic areas, distribution centers, clients, seasons or periods of time among persons with vertical relationships [...]”⁵¹⁶. Article 8(c) as such left it open for investigating authorities to choose between an effects-based analysis or a *per se* approach. In other words, silence in relation to the approach of analysis under Law No. 3/2005 does not necessarily signify that investigating authorities should employ a *per se* approach; as EL-Far argues⁵¹⁷.

For instance, the ECA, in its *Steel* study, employed an effects-based approach to this practice. It was particularly concerned with the compatibility of Ezz Group’s standard distribution agreement with Article 8(c). Article 4 of such agreement stipulates that: “In the event where the second party (approved distributor) refrains from receiving the quantities specified to him/her on a monthly basis by virtue of this agreement by a volume exceeding 10% of the quantity initially agreed upon due to reasons related to him/her and not the market for a period of two consecutive months, the first party (Ezz Group) shall be entitled to reduce his/her monthly quantity to the extent of the actual quantities received for the remaining period of the agreement”⁵¹⁸.

The ECA found that Ezz Group’s system of approved distributors and monthly portions did not violate competition law. As for the issue of reduction of quantities, it perceived that this approach might raise competition law compliance concerns. More specifically, it stated that a practice as such might lead to exclusivity in dealing with Ezz Group’s product. However, contrary to what El-Far suggests, the ECA concluded that such practice did not violate Article 8(c) on the premise that *the volume of sales of other producers was not deterred. It indicated, on the contrary, that throughout the period of study, the demand on Steel Rebar in general significantly increased*⁵¹⁹. In fact, the

⁵¹⁶ Article 8(c), Law No. 3/2005; Article 13(c), Executive Regulations

⁵¹⁷ El-Far, M. (2010) “Enforcement Policy of the Egyptian Competition Law” *Competition Law International*, Journal of the Antitrust Committee of the International Bar Association, [April 2010 issue], p.55, as cited in Greiss, M. (2010) *op.cit.*, p.27

⁵¹⁸ See Report of the Egyptian Competition Authority on the *Steel Rebar* Market, pp.42-44

⁵¹⁹ Ibid, p.45; El-Far, M. (2010) “Enforcement Policy of the Egyptian Competition Law” *Competition Law International*, Journal of the Antitrust Committee of the International Bar Association, [April 2010 issue], p.55

ECA's analysis confirms the suggestion that it is the *actual* effects on competition and consumers that matters; and as such reflects the *Shari'ah* principles.

The Egyptian legislator, furthermore, stipulates an effects-based approach to price discrimination abuses. Article 13(e) of the Executive Regulations provides that: "Discriminating between sellers or buyers having similar commercial positions in sale or purchase prices or in terms of the transactions, *in a manner that weakens their ability to compete with one another or leads to drive out some of them from the market*". This means that price discrimination exercised by a dominant firm shall not be caught under Article 8(e) of Law No. 3/2005 *unless* it is proven that such a practice undermines the position of related purchasers in the market or otherwise drives them out of it. In the same vein, predatory pricing or pricing below marginal cost or average variable costs does follow the same approach. In fact, the Egyptian legislator stipulates a four-tiered test for determination of whether or not such a pricing structure is anti-competitive. Article 13(h) of the Executive Regulations provides that: "For the determination of whether the product is sold below their marginal cost or the average variable cost the following elements shall be taken into consideration:

1. *If the sale will drive out the dominant persons' competing persons from the market;*
2. *If the sale will prevent the dominant person's competing persons from entering the market;*
3. *If the dominant person will be able to increase prices after driving out its competing persons from the market; and*
4. *If the period of time of the sale of a product below its marginal cost or its average variable cost will result into the occurrence of any of the aforementioned*"⁵²⁰.

In this sense, for a predatory pricing practice to be deemed abusive, the Egyptian legislator required the satisfaction of the above-mentioned elements collectively. For instance, if the pricing below marginal or average variable costs by the dominant firm

⁵²⁰ Article 13(h), Executive Regulations

does not drive its competitors out of the market or generate significant entry barriers, then the practice shall not be contemplated as abusive; even if the remaining elements were satisfied⁵²¹. The Egyptian legislator, similarly, imposes an effects-based approach to exclusive dealing abuses. Article 8(i) of Law No. 3/2005 prohibits a dominant firm from: “Obliging a supplier not to deal with a competitor”⁵²². Article 13(i) of the Executive Regulations adds to such stipulation that: “The non-dealing shall mean the refraining from dealing with a competing person, whether totally or reducing the size of dealing with him *to the extent that would drive it out of the market or prevent the potential competitors from entering the market*”⁵²³. This means that a dominant firm is not prohibited from obliging its supplier/distributor from dealing with its competitors *unless* such exclusivity drives the latter out of business or precludes market entry⁵²⁴.

Similar to Article 8(c) of Law No. 3/2005 (as discussed above), the Egyptian legislator left it open for investigating authorities to choose the approach they find suitable to abusive practices stipulated under Articles 8(d) on tying arrangements, 8(f) on the refusal to produce scarce products whenever it is economically feasible, and 8(g) on the prevention of competitor(s) from gaining access to the dominant firm’s utilities or services; despite being economically viable. Hence, the ECA and Courts may choose to employ an effects-based approach in respect of these practices.

4.6 CONCLUSION

The EU and Egyptian rules on dominance appear to function equivalently in the sense that dominance in itself is not prohibited. Moreover, despite that both systems require different market share thresholds for finding dominance one may arguably conclude that the determination of dominance in general reflects an equivalent treatment. This conclusion is based on two assumptions: First, market share thresholds are not credible indicators of dominance, and; second, EU and Egyptian systems similarly recognize market barriers and contemplate them as indispensable determinants of dominance.

⁵²¹ Greiss, M. (2010) *op.cit.*, pp.27-28

⁵²² Article 8(i), Law No. 3/2005

⁵²³ Article 13(i), Executive Regulations

⁵²⁴ Greiss, M. (2010) *op.cit.*, p.28

This chapter explored three distinctive characteristics in the Egyptian system. First, that Egyptian Competition Law does not regulate or discipline the abuse of excessive pricing, in contrast with the EU system; although the latter system does not contemplate this practice as a priority for investigation. Despite that the arguments against regulating the conduct of excessive pricing may seem potential, *Shari'ah* strongly condemns these practices. Indeed, this is based on the negative effects that may be inflicted by such practices on society in general and related consumers in particular – as proponents of a prohibition on excessive pricing argue. To this end, the lack of excessive pricing prohibition under Egyptian Competition Law raises Islamic law concerns.

The second characteristic is where the Egyptian law does not comprehensively regulate the practice of margin squeeze. Particularly, it appears to have missed the event where a dominant firm may choose to squeeze the margin of its competitors in the downstream market rather than the upstream one through pricing below-cost at the retail level. The third characteristic relates to the method of analysis. It is observed that the EU Commission is currently moving towards an effects-based approach in relation to the implementation of Article 102 TFEU. However, EU Courts still show some reluctance to employ this approach. In this sense, one may argue that the EU system is currently in transition in respect of deploying an effects-based approach. The Egyptian system, on the other hand, seems to reflect this modernized approach in many respects – as Article 13 of the Executive Regulations provides. In fact, the ECA, contrary to civil law traditions, employed an effects-based approach in the *Steel* case whereas the Executive Regulations are merely *silent* in this respect. Arguably, however, the Egyptian regime, inspired by Islamic principles, seems to go a little further to adopt an *actual* effects standard.

Exploring and discussing these three characteristics (which one may contemplate as gaps), however, is not sufficient; several vital questions underlie them. Does the lack of prohibition of excessive pricing pose any distorting threat to Egyptian economy? Similarly, does the lack of legal treatment of below-cost margin squeeze have any potential effects in Egyptian economy? Furthermore, notwithstanding the compatibility of this approach with *Shari'ah*, are the ECA and courts at the current stage ready to employ an effects-based approach? If not, how can the deployment of this approach

harm the Egyptian economy and be incompatible with *Shari'ah* as well as a result? What are the appropriate methods to tackle these characteristics? When should they be tackled accordingly, if at all?

CHAPTER 5

EVALUATING POTENTIAL EFFECTS IN THE EGYPTIAN ECONOMY: METHODS FOR TACKLING GAPS IN THE TREATMENT OF ABUSE OF DOMINANCE UNDER EGYPTIAN COMPETITION LAW

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5.1 INTRODUCTION

The preceding chapter demonstrates that the Egyptian system is distinctive in three ways. First, it lacks an excessive pricing prohibition; second, it does not provide comprehensive legal treatments to margin squeeze, and third, it employs an effects-based approach at this early stage of competition law implementation. These (one may term them ‘gaps’) may arguably have potential effects in the economy and discourage trade and FDI in Egypt. In fact, several questions lie beneath these gaps. To what extent can they hinder the Egyptian economy? What is the best possible solution for Egypt at the current stage? If different, would the solution vary in the future compared to what is presently suggested?

The aim of this chapter is to evaluate and conceptualize the effects in the Egyptian economy that may arise from the concerned gaps. While it will be found that they may generate potential effects, legal reform may be deemed necessary in the future. The question is: What structure of legal reform and when? Is legal transplantation the correct answer to these gaps? Does timing play a decisive role in this respect? For this reason, the chapter constitutes a vital part of the present thesis.

The chapter is divided into three main parts. The first part will investigate in detail the effects of each gap in the treatment of abuse of dominance in the Egyptian economy. The second part will then attempt to tackle these gaps in light of the comparative law methods developed in chapter two. The third part recognizes technical assistance from competition authorities of the developed world as a method that generally ensures optimal implementation of Egyptian Competition Law. More specifically, it discusses the cooperation mechanisms developed by the Euro-Mediterranean Partnership, along with some other multilateral projects.

5.2 INVESTIGATING POTENTIAL EFFECTS ON THE EGYPTIAN ECONOMY

“There are strong links between competition policy and numerous basic pillars of economic development. [...] There is persuasive evidence from all over the world confirming that rising levels of competition have been unambiguously associated with increased economic growth, productivity, investment and increased average living standards”⁵²⁵.

Competition law has been frequently associated with economic development. A report prepared by the WTO Working Group argues that competition law, as part of economic policy, provides economies – specifically emerging ones - with myriad benefits. For instance, economies that adopt competition law may benefit from an optimal allocation of resources, tackling high concentration levels, preventing anti-competitive practices, encouraging foreign investments, etc.⁵²⁶. Nonetheless, a competition law with loopholes or that is otherwise inappropriately implemented by competition authorities or courts may generate potential effects in national economies in a manner that may overcome these benefits.

By employing the functionalistic method of comparative law, the preceding chapter surveyed some potential influences of EU rules and Islamic principles on the legal treatment of abuse of dominance under Egyptian Competition Law and explored some major gaps in the latter emerging system. It is believed that these gaps, if not tackled, may have potential effects on the Egyptian economy. Chapter four encompassed the 4 different possibilities which *tertium comparationis* ought to cover in comparative studies. First, it found that the EU and Egyptian systems share the “same legal rule” in some respects (or the latter is arguably influenced by the former). For instance, dominance in itself is not prohibited and that it is the abuse of such dominance that is prohibited. Second, in several other respects, EU and Egyptian systems stipulate

⁵²⁵ Preston, J. (2003) *“Investment Climate Reform Competition Policy and Economic Development: Some Country Experiences”* DIFID Case Study for WDR, p.2, as cited by Waked, D. I. (2008) “Competition Law in the Developing World: The why and how of adoption and its implications for international competition law” *Global Antitrust Review*, QMUL, p.73

⁵²⁶ World Trade Organization, Paper of 18th September, 1998, WT/WGTCP/W/80, as cited by Waked, D. I. (2008) *op.cit*, p.73

“different rules” albeit serving the “same function”. For example, abuse of dominance is prohibited under EU and Egyptian regimes with distinct rules i.e. different stipulations and methods (e.g. market share thresholds for dominance determinations). Nevertheless, they appear to serve the “same function”: the protection of the competitive process as a *means* for enhancing consumer welfare. In fact, it is this “same function” factor, among others, that exemplifies the influence of EU rules (and Islamic principles) on the Egyptian system.

Third, the EU and Egyptian systems generate, or are likely to generate, distinct outcomes. For instance, the present study found that the EU’s current approach to Article 102 TFEU does not yet *fully* endorse an effects-based approach. The ECA, Law No. 3/2005 and its Executive Regulations, on the other hand, explicitly made clear the intention to employ an effects-based approach to abuse of dominance. Despite it is argued that the Egyptian system’s deployment of an effects-based approach originally derives from the EU Commission’s initiative, it is perceived that the ECA, arguably influenced by Islamic principles, has gone a step further to require an *actual* effects standard⁵²⁷. This means that until the EU Commission’s initiative to reform Article 102 TFEU in a manner that may lead to the endorsement of a full effects-based approach would be supported by courts, the EU and Egyptian regimes may lead to distinct outcomes. Fourth, the study found some substantial omissions from Law No. 3/2005 and its Executive Regulations; most notably for the purposes of this chapter: Excessive pricing⁵²⁸ and below-cost margin squeeze. These gaps and their potential effects will be investigated in turn.

5.2.1 Potential effects that may arise from the lack of excessive pricing prohibition

The fact that excessive pricing is not regulated under Egyptian Competition Law means that firms are entitled to set their prices above prevailing market ones; so long as they do not amount to any of the practices prohibited under that law (price fixing, price

⁵²⁷ See discussion of the ECA’s approach in the *Steel* case in part 4.5.2 (chapter four).

⁵²⁸ Nonetheless, it should be recalled that the practice of excessive pricing does not represent a priority for investigation in legal systems like the EU (as discussed in the preceding chapter).

discrimination, etc.)⁵²⁹. Indeed, the Egyptian legislator appears to have endorsed such arguments while drafting Law No. 3/2005 and its Executive Regulations. Nevertheless exercising this practice by large firms should not be ruled out; at least in some exceptional circumstances. This may be particularly the case in emerging economies like Egypt.

In fact, the high levels of concentration that prevail in the Egyptian market as a result of the 1991 privatisation programme⁵³⁰ may increase the likelihood of success of excessive pricing. This may be the case due to the lack of effective competition culture in many sectors. This may also be attributed to the existence of high barriers to entry created by dominant firms. For instance, in the Fresh Juice and Non-Alcoholic Beverages Industry, there are only two or three firms that dominate 75% of the market. Moreover, only a few firms dominate 70% of the Fabrics Production Industry. In the Cement Industry, while twelve firms operate, only three of them account for 70% of total production. The above data indicates that the Egyptian market in general is *highly concentrated*⁵³¹.

Furthermore, the ECA in its *Steel* report noted that on some occasions having many players with close market shares in one market might indicate the absence of market power. However, closer insights reveal on the contrary that the Steel Rebar Market is “highly concentrated”. The market share threshold of the top four companies amounted for 85% in 2006 – a finding that signifies that having many competitors does not in itself restrict the actions of Ezz Group. Consequently the small number of actual competitors, in addition to their undersized market share thresholds in comparison with Ezz Group, indicates a reasonable presumption of their inability to affect Ezz Group’s prices and volume of output⁵³².

⁵²⁹ See discussion on the legality of high pricing in general in part 4.3.3.1 (chapter four).

⁵³⁰ See the discussion developed in part 1.3 (chapter one).

⁵³¹ See Abdellatif, L. M. and Ghoneim, A. F. (2008) “Competition, Competition Policy and Economic Efficiency in the MENA Region: The Case of Egypt” Sekkat, K. (Eds.), *Competition and Efficiency in the Arab World*, New York: Palgrave, Macmillan, as cited in Greiss, M. (2010) “Abuse of dominance under the Egyptian Competition Law: Investigating peculiarities that may have special effects in the economy” (2), *Mediterranean Competition Bulletin*, p.28

⁵³² Report of the Egyptian Competition Authority on the *Steel Rebar* Market.

In fact, the Harvard School's proponents argue in favour of a link between market concentration and high prices in a given market; namely the 'structure, conduct and performance paradigm' ('S-C-P'). According to the S-C-P, the structure of a given market identifies the market behaviour of its players, which in turn verifies its performance. Hence, the structure remains the starting and core element in determination of the market's performance. The S-C-P works by carrying out the necessary studies on concentration and entry barrier levels, which, in turn, constitutes the market structure facts. These facts would then be linked with the degree of profitability in the market⁵³³. The S-C-P's proponents as such argue that firms with substantial market shares do essentially have monopoly power that would, in turn, result in high prices⁵³⁴. The question that lies beneath this school of thought is how may the Egyptian market and economy incur potential effects from high prices in general?⁵³⁵

In essence, high prices directly harm consumer welfare⁵³⁶. Some argue that the core objective of antitrust law should be to offer the "benefits of competition to consumers". Consumer gains in this sense are achieved through offering low-priced and quality products with reasonable choice. Put differently, the objective of antitrust is to protect consumers from anti-competitive and exploitative activities that may "unfairly" shift welfare from consumers to dominant firms. This shift may not indeed result in total welfare maximization; but would merely increase welfare of the dominant firm(s) at stake. Prices set above the competitive level tend to generate "allocative inefficiency". Monopoly raises prices and in turn reduces the volume of output. Products that are no longer sold may be valued more for future buyers relative to what they would cost

⁵³³ Monti, G. (2007) "*EC Competition Law*" First edition, CUP, pp.57-59; Peeperkorn, L. and Verouden, V. (2007) "The Economics of Competition" *The EC Law on Competition*, 2nd Edition. Faull and Nikpay (Eds.) OUP, p.6

⁵³⁴ Monti, G. (2007), *op.cit.*, p.58

Conversely, as indicated in the preceding chapter in the part on excessive pricing, many Chicago School observers (most notably Demsetz and Posner) remain sceptical about the S-C-P's assumption that firms with high market shares would essentially gain and exercise market power and as a result, charge high prices. They particularly stress the idea that these firms' prices may be undercut; whether by competitors or potential entrants (i.e. market *self-correction*). See Demsetz, H. (1973) "Industry Structure, Market Rivalry and Public Policy" (3), *Journal of Law and Economics*, University of Chicago Press, pp.1-9

⁵³⁵ Greiss, M. (2010) *op.cit.*, pp.28-29

⁵³⁶ Consumer welfare may be defined according to Bork, a Chicago School observer, as "maximization of wealth or consumer want satisfaction". See Orbach, B. Y. (2010) "*The Antitrust Consumer Welfare Paradox*" Arizona Legal Studies, Discussion Paper No. 10-07, available from: (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553226), accessed 28-07-2010, p.11

society to manufacture. This entails a case of “pure social loss” in a manner that comprises “allocative inefficiency”⁵³⁷.

Moreover, Bork argues that the likely purpose of antitrust is to promote the efficiency of economies. He suggests that: “The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or net loss in consumer welfare”⁵³⁸. This means that competition in itself encourages allocative efficiency that would inevitably enrich consumer welfare – needless to say that the success of excessive pricing may in itself imply lack of competition⁵³⁹. Bork rationalizes his aforementioned view by submitting that: “The preference for competitive rather than monopolistic resource allocation is most clearly explained and firmly based upon a desire to maximize output as consumers value it”⁵⁴⁰.

In this sense pricing above the competitive level or excessive pricing in particular - in light of the above views – is incompatible with the objectives of competition law on the premise that it causes allocative inefficiency and is detrimental to consumer welfare and efficiency of the economy. Such effects may indeed be seen in the Egyptian market. For instance, if the price of a particular product or service is excessive, consumer welfare may be deterred in a manner that may lead to allocative inefficiency - an outcome that may gradually be passed on to the Egyptian economy; depending on the importance of that product or service and its usage. In fact, the potential effects of excessive pricing on consumer welfare may be better explained by two scenarios: First, excessive prices in the primary market; and second, excessive prices in the secondary market⁵⁴¹.

⁵³⁷ Kirkwood, J. B. and Lande, R. H. (2008) “The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency” 84(1), *Notre Dame Law Review*, pp.192,197

For more detail on how allocative inefficiency is caused by high prices, see Mansfield, E. (1982) “*Microeconomics: Theory and Applications*” 4th Edition, pp.277-292, as cited by Kirkwood and Lande (2008), *op.cit.*, p.197, all of which cited in Greiss, M. (2010) *op.cit.*, p.29

⁵³⁸ Bork, R. H. (1993) “*The Antitrust Paradox*” p.91, as cited by Kirkwood and Lande (2008), *op.cit.*, p.198, cited in Greiss, M. (2010) *op.cit.*, p.29

⁵³⁹ See Orbach, B. Y. (2010) “The Antitrust Consumer Welfare Paradox” Arizona Legal Studies, Discussion Paper No. 10-07, available from:

(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553226), accessed 28-07-2010, p.10

⁵⁴⁰ Bork, R. H. (1967) “The Goals of Antitrust Policy” (57), *American Economic Review*, p.245, as cited in Greiss, M. (2010) *op.cit.*, p.29

⁵⁴¹ Greiss, M. (2010) *op.cit.*, p.29

The first scenario presupposes that excessive prices prevail in the primary market (i.e. the market that supplies the main product). This scenario assumes that the excessively priced product or service in the primary market is complementary to another product or service in the secondary market. For instance, in a study on the Egyptian Steel Market, whereby Steel is an essential product to construction, Selim found that when Steel prices arose in 2003, numerous small and medium-sized construction firms stopped operating on the basis that they could not afford such inflated prices. This is because Steel represents 20% of the constituents of construction, as the former Chairperson of the ECA, had once indicated⁵⁴². Such effect, if lengthy, may drive even more construction firms out of the market. This means that when markets are characterised by inelasticity, excessive pricing may harm the Egyptian economy⁵⁴³. In this sense, the effects of excessive prices in the primary market, aside from their effects on consumers of that primary product, may have a formidable impact on the secondary market. Indeed such cause may have a chilling effect on other corresponding markets as well.

The second scenario, in contrast with the first, assumes that excessive prices exist in aftermarkets (or secondary markets). Aftermarkets are markets that offer goods or services that complement the primary product or that are otherwise essential for it (e.g. spare parts, maintenance services, etc). Assume that a car manufacturer was dominant in the aftermarket of servicing and spare parts where it charged excessive prices; as opposed to the primary market (car manufacturing) where it was not dominant and prevailing prices were not excessive⁵⁴⁴. Inevitably, consumers/buyers of that car may

⁵⁴² Al-Ahram Newspapers, “Chair-women of Egyptian Competition Authority: No Monopoly in imported Meat” dated Saturday 15th May, 2010, Issue No. 45085, [Article in Arabic], available from: (<http://www.ahram.org.eg/167/2010/05/15/5/20414.aspx>) accessed 15-05-2010

⁵⁴³ Selim, P. H. (2006) “Monopoly: The Case of Egyptian Steel” 2(3), *Journal of Business Case Studies*, P.89

⁵⁴⁴ Although under ordinary circumstances, a firm that holds a dominant position in the primary market will in turn be dominant in the related aftermarket. However, this is not always the case. For instance, General Motors was not dominant in the cars manufacturing market, whilst being dominant in the aftermarket for conformity certificates for cars that were purchased through parallel imports (i.e. imports through car dealers rather than manufacturers) in Belgium. See Commission Decision IV/28.851, *General Motors Continental*, [1974] O.J. L 029. Note that the CoJ overturned this decision. See Case 26/75, *General Motors Continental v. Commission* [1975] E.C.R. 1367, as cited in Greiss, M. (2010) *op.cit.*, p.30

Moreover, in *Hugin v. Commission*, the CoJ upheld the Commission’s decision that found Hugin dominant in the market for spare parts of cash machines (aftermarket) which Hugin itself produces; as opposed to its position in the primary market. See Case 22/78 [1979] E.C.R. 1869, 3 CMLR 345.

incur significant financial losses as a result of excessively priced spare parts and maintenance services⁵⁴⁵.

Notwithstanding the foregoing effects that may arise, maximizing consumer welfare and attaining economic efficiency are prioritized in Egypt. The ECA on several occasions implied that they lie at the heart of competition law. For instance, a message from the ECA's former Executive Director read: "The Egyptian Competition Law aims at ensuring that economic activities are carried out freely by all market players and that the market place offers an enabling framework for everyone to achieve his/her goal. This aim can be achieved only if equal opportunities were given to every person doing business in the market. The criterion for staying in/out of business should be *economic efficiency and ability to satisfy consumers in terms of quality and competitive prices of goods and services in the market*"⁵⁴⁶. On another occasion (as highlighted in the preceding chapter), he stressed that: "Competition is not a goal in itself but rather a means for *making markets work better for consumers*"⁵⁴⁷.

Moreover, in a statement of its vision in its Annual Report 2006-2007, the ECA mentioned that it: "*Aims to bring benefit to the national economy in general and welfare to the society*"⁵⁴⁸. However, it is (arguably) unequivocal from the foregoing appraisal that the national economy may be impeded by the lack of prohibition of excessive pricing. The income of the society may not be distributed equally among the society - a result that certainly raises *Shari'ah* concerns. In addition, these potential effects may undermine the above-mentioned ECA's aims and vision. Some *may*, however, suggest

⁵⁴⁵ Indeed reasonable consumers usually inquire about prices in aftermarkets prior to or at the time of purchasing the relevant primary product. However, information on pricing in aftermarkets may not always be passed on to consumers at the time of purchase either because *they did not inquire about aftermarket prices or that information was not existent or deliberately hidden by the seller of the relevant primary product*. For more insights on aftermarkets, see Mosso, C. E., Ryan, S. A., Alback, S. and Centella, M. L. T. (2007) "Article 82" *The EC Law on Competition*, 2nd Edition, Faull and Nikpay (Eds.), OUP, pp.337-338, as cited in Greiss, M. (2010) *op.cit.*, p.30

⁵⁴⁶ See Annual Report of the Egyptian Competition Authority (2006/2007) published on the following Website on 15th June, 2008, available from: http://www.eca.org.eg/ECA/upload/Publication/Attachment_E/15/annual%20report%20english.pdf accessed 16-06-2010, p.5

⁵⁴⁷ Attia, K. (2009) "Introducing Competition Law and Policy - The Case of Egypt" (1), *Mediterranean Competition Bulletin*, p.18, as cited in Greiss, M. (2010) *op.cit.*, p.30

⁵⁴⁸ See Annual Report of the Egyptian Competition Authority (2006-2007), p.15, as cited in Greiss, M. (2010) *op.cit.*, p.30

that these effects could be averted by the application of Articles 10 of Law No. 3/2005 and 19 of its Executive Regulations⁵⁴⁹.

Article 10 of the Law No. 3/2005 provides that: “The Cabinet of Ministers may, after taking the opinion of the Authority, issue a decree determining the selling price for one or more essential products for a specific period of time. Any agreement concluded by the Government for the purposes of the implementation of these prices shall not be considered an anti-competitive practice”⁵⁵⁰. Article 19 of the Executive Regulations expands on this by providing that: “The Authority carries out the necessary studies for the Council of Ministers Cabinet to perform its competence set out in Article 10 of the Law regarding the determination of the selling prices of the essential products and prepares the reports on the opinion of the Authority on this matter”⁵⁵¹.

However, an argument as such may be countered from several respects. First, Articles 10 and 19 raise Islamic law concerns on grounds of its principles on market intervention. Specifically, as discussed in chapter three, the state’s power to control market prices – in general – *is not unlimited*. It is essentially guided by two principles: the principle of *no-harm*; and, the principle of *maslahah*. Articles 10 and 19, on the other hand, seem to declare the power to control market prices as rather *discretionary* among the Council of Ministers Cabinet according to studies that the ECA undertakes. In other words, these provisions do not stipulate any limitations in relation to price intervention (such as for instance, an analysis of *actual* negative effects on consumers); leaving it subject to the discretionary power of the Council of Ministers Cabinet.

Second but not least, even if one presupposes that Articles 10 and 19 are compliant with Islamic principles, the power to control prices in relation to *essential* products has hardly been used since the introduction of Law No. 3/2005 and its Executive Regulations. This is notwithstanding the fact that prices of Cement, Steel and Meat, as *essential products*, substantially rose throughout the period 2006-2009 and that the ECA

⁵⁴⁹ Note that Article 18 of the Executive Regulations is more or less a replica of Article 10 of Law No. 3/2005.

⁵⁵⁰ Article 10, Law No. 3/2005; Greiss, M. (2010) *op.cit.*, p.30

⁵⁵¹ Article 19, Executive Regulations; Greiss, M. (2010) *op.cit.*, p.30

had already conducted studies on the three sectors. Although these studies found that prices of the aforementioned products were high, the Council of Ministers Cabinet did not make use of Articles 10 and 19⁵⁵². This *may*, however, be explained by the fact that Articles 10 and 19 as such are incompatible with Article 10 of the Law No. 8/1997 for Investment Guarantees and Incentives which provides that any firm incorporated with an aim to engage in any activity will not be subject to any form of price control⁵⁵³.

Finally, Articles 10 and 19 *only* relate to essential products. This means that products that are not deemed essential *per se* are not covered. Indeed this limited stipulation may not raise any *Shari'ah* concerns that are primarily focussed on essential or day-to-day products, which, if not supplied, may be life threatening. It rather raises consumer benefits concerns, which indeed seems to be the ECA's first and foremost concern - judging from the quotations above-mentioned - in the sense that excessive prices associated with any non-essential product would be detrimental to their welfare.

5.2.2 Does the lack of comprehensive prohibition of margin squeeze pose potential effects to the Egyptian economy?

As indicated in the preceding chapter, Article 13(b) of the Executive Regulations seems to focus solely on the event where a vertically integrated firm that is dominant in the upstream market chooses to squeeze its downstream competitors' prices through charging them high prices in return for the essential input (what is known as *constructive* refusal to deal or margin squeeze). In other words, the Egyptian legislator, while drafting Law No. 3/2005 and its Executive Regulations, seems to have missed the event where the firm concerned chooses to squeeze its competitors' prices in the downstream market rather than the upstream one through *strategically* selling its retail

⁵⁵² See Report of the Egyptian Competition Authority on the *Cement* Market. For a much more recent evidence on this, see Report of the Egyptian Competition Authority on the *Steel Rebar* Market; Report of the Egyptian Competition Authority on *Imported and Domestically Produced Red Meat* Market.

Note that Fertilizers was the only essential product that was referred to the Council of Ministers Cabinet due to high prices so far. See Report of Egyptian Competition Authority "*Study on the Fertilizers Market in the Arab Republic of Egypt in light of the Law on Protection of Competition and Prohibition of Monopolistic Practices*" May 2007 [Report in Arabic Language], available from: (<http://www.eca.org.eg/ECA/Publication/List.aspx?CategoryID=1>) accessed 02-08-2010

⁵⁵³ Article 10, Law No.8/1997 for Investment Guarantees and Incentives, as cited by Dabbah, M. M. (2007) "*Competition Law and Policy in the Middle East*" CUP, p.249, all of which cited in Greiss, M. (2010) *op.cit.*, p.31

product at below-cost prices. The question is whether this form of pricing may generate potential effects on the economy.

In contrast with the case of exploitative or excessive pricing practices (as discussed in the preceding part) - where welfare is transferred from consumers to dominant firms - below-cost pricing transfers the welfare from firms to consumers⁵⁵⁴. Inevitably, however, this pricing strategy is capable of, not only driving current downstream competitors out of the market, but also creating high barriers to market entry and, as such, may undermine consumer choice in that market. In fact, this seems to contradict with the statement of former Executive Director that *competition is a means for making markets work better for consumers* (as cited in the preceding part). This is because excluding competitors may distort the process of competition as a consequence. Indeed, consumer welfare that seems to be the ultimate concern of the ECA may not be deterred in the short-run. Arguably, however, the lack of harm may only last for a very short term.

Proponents of the Harvard School (although in relation to predatory pricing⁵⁵⁵) argue that below-cost pricing is an inevitably detrimental conduct to the structure of a given market. This is because it inherently increases concentration levels in the market by way of driving the incumbent's competitors out of the market⁵⁵⁶. Although hindering the market structure by way of excluding competitors as such may generate potential effects

⁵⁵⁴ Indeed, as indicated earlier, this event presumes that the concerned firm is not dominant in the downstream market (aside of the upstream one); otherwise it could be caught under Article 8(e) of Law No. 3/2005 as price predating.

⁵⁵⁵ It is argued that the concerned practice (subject of this part) is similar to predatory pricing on the basis that they both assume an exclusionary intent and are likely to have fairly similar effects.

⁵⁵⁶ On this matter, see Areeda, P.E. and Turner, D.F. (1975) "Predatory Pricing and Related Practices under Section 2 of the Sherman Act" (88), *Harvard Law Review*, pp.697-698; Hovenkamp, H. (2007) "*The Harvard and Chicago Schools and the Dominant Firm*" University of Iowa Legal Studies Research Paper Number 07-19, available from: (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014153) accessed 25-11-2010, p.3

Nonetheless many Chicago School proponents remain sceptical about the Harvard School's views. McGee was amongst the Chicagoan economists who argue that predatory pricing is so unlikely to occur to the extent that antitrust protection is not essential; often named as the "no rule approach". However, these views (understandably) seem to presuppose that the dominant firm in question is *not* a vertically-integrated one that operates in the upstream and downstream markets and, as such, may be capable of recouping these below-cost prices almost instantaneously through its upstream sales – a market where it is assumedly dominant and operates profitably. On the Chicago School's views of predatory pricing, see McGee, J. (1958) "Predatory price-Cutting: The Standard Oil (N.J.) Case, (1), *Journal of Law and Economics*, p.137; Monti, G. (2007) "*EC Competition Law*" First edition, CUP, pp.67-68

that may be passed on to the economy (e.g. employment concerns), it is perceived that these effects are not as significant as those that may arise from the lack of exploitative or excessive pricing prohibition in Egypt. This is based on two vital intertwined grounds.

First, the fact that the concerned vertically-integrated firm is not dominant in the downstream or retail market (where margin squeeze takes place) may reduce the potency of such effects, since consumers may (arguably) prefer to sacrifice the difference between the concerned firm's competitors' prices (no doubt for the dominant one(s) in the retail market who charge higher prices) and its own prices. This is indeed for reliability and commercial reputability purposes. This is not, however, to say that a firm that is not dominant may not pose any potential effect *per se*. It is rather to submit that the (presumably) relative lack of market power may reduce the likelihood of such effect – as opposed to where the firm is dominant⁵⁵⁷.

Second, even if one presupposes that such practice may exclude dominant downstream firms (although relatively unlikely in this case), it is perceived that the more the competitors the vertically-integrated firm excludes from the downstream market, the higher the degree of market power it acquires in that market. The likely consequence indeed would be that the firm could be found price predating under Egyptian Competition Law. In this sense, Article 8(e) of Law No. 3/2005 acts as a safeguard for this practice and, as such, may arguably diminish the potential effects to the economy. However, this does not preclude the necessity of providing a much more comprehensive prohibition of margin squeeze; if not for the sake of the arguably limited spill-over effects in the economy, it is for the purposes complying with the principles of *Shari'ah*.

⁵⁵⁷ This reflects the discussion in part 4.5 (chapter four) on whether or not the dominance test really matters while employing an effects-based approach to abuse of dominance. While the EU Commission does not exclude the possibility that a *less efficient competitor* may pose competitive constraints to the dominant firm(s), it implies that this may be the case only in limited or exceptional circumstances. See particularly part 4.5.1 (chapter four).

5.2.3 Potential effects that may arise from employing an effects-based approach to abuse of dominance

As envisaged in the preceding chapter, most abusive practices stipulated under Article 8 of Law No. 3/2005 are settled through an effects-based approach, pursuant to Article 13 of the Executive Regulations. This was confirmed in an interview with Dr. Khalid Attia (former Executive Director of the ECA)⁵⁵⁸. In this sense, the Egyptian approach to abuse of dominance seems to conform to Easterbrook's error-cost framework by favouring type I errors over type II errors⁵⁵⁹. However, this poses a key question that should be raised in this respect: Is Egypt, as an emerging economy with a newly introduced competition law, ready to deploy an effects-based approach to abuse of dominance at this early stage?

The mainstream of the literature appears to suggest that emerging economies, while new to competition law, should try to avoid employing complex economic analysis in competition-related disputes. For instance, Mohieldin argues that "Emerging economies with either little or no experience of administering a complex regulatory framework may at first opt for a competition law that can be easily enforced". In other words, he believes that an effects-based approach may not be the best possible approach for emerging economies. Instead, they should employ the "more straightforward *per se* approach"⁵⁶⁰.

Furthermore, a group of constitutional economists argue against this degree of market intervention. As described in chapter three, they suggest that the process of implementing legal rules should be carried out with the least assessment possible⁵⁶¹. This is to provide the public with *predictability* and *legal certainty* – characteristics

⁵⁵⁸ Interview with Dr. Khalid Attia, former Executive Director, Egyptian Competition Authority, by email (kattia@sarie-eldin.com) on 29-04-2010

⁵⁵⁹ Recall that according to Easterbrook: "The economic system corrects monopoly [type I errors] more readily than judicial [type II] errors". See Easterbrook, F. H. (1984) "The Limits of Antitrust" (63), *Texas Law Review*, p.15, emphasis added (as cited in chapter three).

⁵⁶⁰ Mohieldin, M. (2002) "*On the Formulation and Enforcement of Competition Law in Emerging Economies: The Case of Egypt*". OECD, Global Forum on Competition, Contribution from Egypt, p.3; Greiss, M. (2010) *op.cit.*, p.32

⁵⁶¹ Christiansen, A. and Kerber, W. (2006) "Competition Policy with optimally differentiated rules instead of *per se* rules vs. rule of reason" 2(2), *Journal of Competition Law and Economics*, OUP, p.219 (as cited in chapter 3)

which undeniably apply to a *per se* approach to competition law⁵⁶². Moreover, it is suggested that eradicating the “wide discretionary scope” from governmental authorities, which an effects-based approach offers, may reduce the likelihood of “interest groups” influence in the decision-making process⁵⁶³. Although constitutional economists who adopt these insights were mostly Ordoliberals who based such views on their robust experience during the Weimar Republic era (where influence of ‘interest groups’ was vast), these insights may still be pragmatic in Egypt.

In fact, the risks of ‘interest groups’ influence nowadays are primarily posed to emerging economies in particular. These economies tend to be distinguished by their significant “government interference”, not only in the economy, but also in legal proceedings. Particularly, these economies are often characterized by the tendency of misusing bureaucratic power through intervening in markets. This may take the form of adopting market barriers that may not be surpassed in specific sectors for the sake of ‘interest groups’ who may be entrepreneurs whilst being high-profile members of the government. This in turn may make legal judgments more political than they are judicial⁵⁶⁴.

Furthermore, similar to Easterbrook’s insights (as discussed in chapter three), it is often argued that the decision-making process may be “imperfect” on the basis of the lack of sufficient “knowledge”⁵⁶⁵. In fact, the dilemma, as Mohieldin writes, is that competition law requires a substantial amount of knowledge on the interface between law and economics. Education and practice in emerging economies, on the other hand, tend to detach law from economics. Such a dividing line makes the task more elusive when it comes to carrying out economic analysis of competition law. That said, legal

⁵⁶² See Voigt, S. and Schmidt, A. (2005) “*Making European Merger Control More Predictable*” Dordrecht: Springer, pp.1-5; Christiansen, A. and Kerber, W. (2006) “Competition Policy with optimally differentiated rules instead of per se rules vs. rule of reason” 2(2), *Journal of Competition Law and Economics*, OUP, p.219 (as cited in chapter 3)

⁵⁶³ See Brennan, G. and Buchanan, J. M. (1985) “*The Reason of Rules*” Cambridge: CUP, as cited by Christiansen, A. and Kerber, W. (2006) “Competition Policy with optimally differentiated rules instead of per se rules vs. rule of reason” 2(2), *Journal of Competition Law and Economics*, OUP, pp.219-220 (as cited in chapter 3)

⁵⁶⁴ Waked, D. I. (2008) *op.cit.*, p.78

⁵⁶⁵ See Vanberg, V. J. (1994) “*Rules and Choice in Economics*” London: Routledge, as cited by Christiansen, A. and Kerber, W. (2006) “Competition Policy with optimally differentiated rules instead of per se rules vs. rule of reason” 2(2), *Journal of Competition Law and Economics*, OUP, p.220

practitioners (be it lawyers, judges or ECA researchers) might arguably lack the necessary experience to conduct economic analysis on antitrust practices at this stage⁵⁶⁶.

Some argue that competition authorities of emerging economies with little experience are more likely to commit errors⁵⁶⁷. In fact, the problem that the ECA and courts may face, given Mohieldin's argument of inefficiency of education and practice in emerging economies, is when it comes to the anticipation of harm or effects caused by abusive practices. This is indeed the most critical and multifaceted part which investigators encounter while employing effects-based analysis⁵⁶⁸. In fact, the U.S. Supreme Court had once stated that: "*Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition*"⁵⁶⁹. This signifies that experience of decision-makers is an indispensable pre-requisite for proper deployment of effects-based analysis. That said, the likely (yet understandable) lack of experience and economic expertise of the ECA and judges at this stage might in fact lead to costly judicial errors in general.

More to the point, the cost of errors could be formidable. Aside from reducing public and government confidence in investigating authorities, as some suggest in relation to judicial errors in general, these errors may eventually impede FDI in Egypt, discourage innovation, and impair cross-border transactions and trade. Indeed FDI and trade are generally considered as vital pillars of an economy. If substantially hindered through such errors, these effects may be passed on to the economy. Put differently, errors in the implementation of competition law may cost the economy severely⁵⁷⁰.

⁵⁶⁶ Mohieldin (2002), *op.cit.*, p.5

⁵⁶⁷ Mehta, P. S., Agarwal, M. and Singh, V. V. (2007) "*Politics Trumps Economics – Lessons and Experiences on Competition and Regulatory Regimes from Developing Countries*" Intergovernmental Group of Experts on Competition Law and Policy, CUTS International, available from: (http://www.unctad.org/sections/wcmu/docs/c2clp_ige8p11Cuts_en.pdf) accessed 05-05-2010, p.24

⁵⁶⁸ Greiss, M. (2010) *op.cit.*, p.32

⁵⁶⁹ See *Arizona v. Maricopa*, 457 U.S. 332, 343 (1982), as cited by Feldman, G. A. (2008) "*The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*" available from: (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279568) accessed 04-07-2010, p.38

⁵⁷⁰ Greiss, M. (2010) *op.cit.*, p.33

5.3 METHODS TO TACKLE THE GAPS IN EGYPTIAN COMPETITION LAW: AN ACTIVIST APPROACH?

*“Where law develops internally through a process of trial and error, innovation and correction, and with the participation and involvement of users of the law, legal professionals and other interested parties, legal institutions tend to be highly effective. By contrast, where foreign law is imposed and legal evolution is external rather than internal, legal institutions tend to be much weaker”*⁵⁷¹

The mainstream of comparative law literature seems to embrace the view that legal borrowing or transplants of laws in general is virtually impossible. The arguments tend to vary from those who base their views on economic development to others who suggest that each law reflects its own legal culture or religion⁵⁷². Berkowitz, Pistor and Richard (quoted above) appear to adopt this view. Several questions stem from this debate. With regards to excessive pricing, is the solution for the potential effects that may arise from the lack of its prohibition is to in fact prohibit it? If so, is it ever feasible for Egypt to successfully borrow a legal rule that prohibits it? Concerning below-cost margin squeeze, although the lack of its prohibition may not pose potential risks in the economy, is it possible to borrow a legal rule that covers such practice (for Islamic law purposes)? With respect to effects-based approach, is it appropriate from an institutional setting standpoint for Egypt to employ an effects-based approach at this stage?

As indicated in the preceding chapter, there exists no precise definition for unfairly high pricing. Nonetheless, one may submit that the prevalent approach is that prices are contemplated as *fair* if they are equal to “competitive” market prices; or otherwise not higher than these market prices. However, the complexity (and concern) which competition authorities tend to face while investigating excessive pricing relates to the

⁵⁷¹ Berkowitz, D., Pistor, K. and Richard, J. F. (2003) “The Transplant Effect” (51), *American Journal of Comparative Law*, p.189 (as cited in chapter two)

⁵⁷² For instance, see Secondat, C. D. and Montesquieu, B. D., (1766) *“The Spirit of the Laws”* 4th edition, Book I, p.7 as cited by Graziadei, M. (2006) “Chapter 13 – Comparative Law as the Study of Transplants and Receptions” *The Oxford Handbook of Comparative Law*, Reimann, M. and Zimmermann, R. (Eds.), OUP, pp.465-466

determination of the “competitive price” of the product or service at stake. There appears to be various approaches for such determination⁵⁷³.

One approach is to base such “competitive” price on the incremental cost of production with market demand in mind⁵⁷⁴. In this sense, the product or service at stake is bought by consumers who have no problem in paying more than the incremental cost of production. However, as Evans and Padilla indicate, this mode of determination assumes that markets are “static” and that production is not subject to high economies of scale. This is indeed hardly the case⁵⁷⁵. The “competitive” price in dynamic markets for instance is not determined on the basis of marginal costs of production. This is because these markets are characterized by low incremental costs and high fixed costs and, thus, obtaining the relevant data on costs would not suffice for determination of “competitive” prices. The investigator, instead, would have to conduct research that surveys the number of consumers who intend to pay for the product/service at stake⁵⁷⁶.

Furthermore, it is sometimes suggested to avoid employing these price-cost determinants and instead rely on a profits-based benchmark. In this sense, prices are contemplated as excessive if the firm at glance gains profits that exceed those which were otherwise initially predicted in a “competitive market”. Nonetheless this approach is often criticised on the basis of likely estimate impreciseness. For instance, complexities in such benchmark may arise when dealing with a set of “related” goods instead of just one product. In addition, this approach may be impractical if the goods at stake are produced, for example, through numerous firm sectors or in more than one country⁵⁷⁷. However, estimation problems do not pose the sole concern in relation to the

⁵⁷³ See Evans, D. S. and Padilla, A. J. (2005), “Excessive pricing: using economics to define administrable legal rules” 1(1), *Journal of Competition Law and Economics*. OUP, pp.100-101

⁵⁷⁴ Incremental costs entail the additional cost to produce a larger increment in output. Technically speaking, the difference between marginal and incremental costs is minor. While marginal costs refer to the additional cost to produce a *single* unit, incremental costs entail the additional cost to produce a larger volume of output than merely one unit. Hence, incremental and marginal costs may overlap when the increment in output is negligible. On the classification of costs in general, see O’Donoghue, R. & Padilla, A. J. (2006) “*The Law and Economics of Article 82 EC*” First Edn., Hart Publishing, Oxford and Portland, Oregon, pp.237-238, as cited in Greiss, M. (2010) *op.cit.*, p.33

⁵⁷⁵ Evans, D. S. and Padilla, A. J. (2005) *op.cit.*, p.101

⁵⁷⁶ See Ahlborn, C., Evans, D. S. and Padilla, A. J. (2001) “Competition Policy in the New Economy: Is European Competition Law up to the Challenge?” (5), *European Competition Law Review*, Sweet and Maxwell, pp.156-164, as cited by Evans and Padilla (2005), *op.cit.*, p.101

⁵⁷⁷ Evans and Padilla (2005), *op.cit.*, pp.101-102

profits benchmark. A further matter, as Evans and Padilla write, is that the accounting proceedings do not take into consideration aspects such as “inflation” or “capitalization” of research and development, as well as advertising, and that the “rates of return for risk” are not accurately adjusted; all of which lead to unworkable determinations. It is, therefore, not surprising to deem the profits benchmark, akin to the price-cost benchmark, as highly debatable⁵⁷⁸.

Given the sound debate surrounding these benchmarks, it is worthwhile exploring how *comparable* emerging economies investigate excessive pricing. Put differently, do they encounter hurdles in the investigation process? A fine illustration is *Harmony Gold Mining Ltd. and Durban Roodepoort Deep Ltd. v. Mittal Steel South Africa Ltd. and Macsteel International B.V.* (‘Mittal’)⁵⁷⁹. This case is particularly relevant to the foregoing controversy on the basis that it represents the *first* excessive pricing dispute in South Africa. This is in addition to the fact that the South African market, akin to the Egyptian market, is *highly concentrated* due to the existence of high market barriers⁵⁸⁰.

In *Mittal*, the South African Competition Tribunal (‘Tribunal’) found Mittal guilty of charging excessive prices for Flat Steel. Specifically, Mittal argued that domestic inflation which took place throughout 1984-1992 forced Iscor (currently Mittal) to follow such rates by 1992. The post-1992 period then featured a surge in imports due to high prices. This surge consequently pressured Mittal to consider “import parity” prices⁵⁸¹. Harmony (complainant) alleged that Mittal had charged “import parity” prices to the domestic market, while charging substantially lower prices or rebates in the export market. This meant an inevitable reduction in the volume of output supplied in the former⁵⁸². From the very early stages of its judgment, the Tribunal explicitly affirmed that the definition of excessive pricing provided under the South African

⁵⁷⁸ See Fisher, F. M. and McGowan, J. J. (1983) “On the Misuse of Accounting Rates of Return to Infer Monopoly Profits” (73), *American Economic Review*, p.82; Evans and Padilla (2005), pp.102-103

⁵⁷⁹ Greiss, M. (2010) *op.cit.*, p.34

⁵⁸⁰ See Fedderke, J. and Szalontai, G. (2005) “*Industry Concentration in South African Manufacturing Industry: Trends and Consequences, 1972-96*” Economic Research Southern Africa Working Paper No. 23/2005.

⁵⁸¹ Note that Mittal was named as ‘Iscor’ at the time. Mittal is also a 50% joint venture partner of Macsteel International since 1995. See South African Competition Tribunal’s decision dated 23rd March, 2007, *Mittal Steel South Africa Ltd and Macsteel International B.V.* Complaint (Case 13/CR/FEB04), paras.22, 28, 167

⁵⁸² *Ibid*, para.164

Competition Act ('SACA') seems to "borrow" from the approach developed by the CoJ in *United Brands*⁵⁸³. Section 1(1)(ix) of the SACA defines excessive pricing as: "A price for a good or service which [...] bears no reasonable relation to its economic value of that good or service [...]"⁵⁸⁴.

Moreover, the Tribunal indicated that although the definition of excessive pricing in the SACA is derived from the CoJ's approach in *United Brands*, there appears to be no such term in Article 102(a) TFEU. The only term used under Article 102(a) is 'unfair' pricing which may entail either excessive pricing or predatory pricing. The definition of excessive pricing in the EU was rather developed under its case law – as opposed to the South African system where the term 'excessive pricing' is derived from the SACA. The Tribunal indicated that in contrast with the EU, while there exists a definition to excessive pricing under the SACA, it must not be abandoned. It, however, interestingly questioned: "What did the South African legislators mean by the definition of excessive price that it inserted into the statute? This enquiry must surely take precedence over an uncritical borrowing from the decisions of a foreign court. We emphasise that this is the approach that our superior courts have commended to us". Having established the importance of employing the SACA's definition, the Tribunal then debated over the wording of the definition⁵⁸⁵.

It interestingly held that: "The judgement then that we are required to make is not of the price level itself but rather of the market conditions that generated the price level. In other words, we must ask ourselves whether the relevant market in question is capable of functioning in a manner that is likely to produce a reasonable relationship of price to economic value, or, rather, whether the structure of the market and, conceivably, ancillary conduct that depends on that anti-competitive structure, forestalls the effective functioning of the market – forestalls '*normal and effective competition*' in the words of

⁵⁸³ Ibid, paras.85, 137

It is important to note that Section 1(3) of the SACA provides that: "Any person interpreting or applying this Act may consider appropriate foreign and international law"

⁵⁸⁴ Section 1, South African Competition Second Amendment Act 39 of 2000; note that Section 8(a) of the South African Competition Act prohibits excessive pricing by stipulating that: "It is prohibited for a dominant firm – (a) to charge an excessive price to the detriment of consumers". Section 8, South African Competition Second Amendment Act 39 of 2000

⁵⁸⁵ South African Competition Tribunal's decision in *Mittal*, paras.138-139

United Brands - thus generating a price, the level of which, is unrelated to, is not influenced by, any *cognisable competition considerations*”⁵⁸⁶. However, the Tribunal indicated that there was no impact posed by any “*cognisable competition considerations*” in relation to Mittal’s pricing structure. It, more specifically, stated: “The key competitive conditions in our market are Mittal SA’s structural super-dominance plus ancillary conduct aimed at maintaining the segmentation of differently priced markets, the cumulative effect of which is to produce a price that is not influenced by any competition considerations whatsoever and is, because of this, adjudged to be excessive”⁵⁸⁷.

The Tribunal’s judgment as such raises significant debate. Particularly, the Tribunal did not conduct a comparison between Mittal’s price and the reasonable economic value of Flat Steel. In turn, it did not discern whether or not Mittal’s prices were reasonable *per se* in relation to economic value. Though finding Mittal’s prices as excessive, the Tribunal did not estimate what would have then been the “right price” that would have circumvented these allegations. In fact, it did not find Mittal guilty on the basis of charging import parity prices for the South African market, but instead relied on resale prices of Flat Steel in the domestic market⁵⁸⁸.

Thus, it was not surprising to see the Tribunal’s judgment being overturned by the South African Competition Appeal Court (‘CAC’). The CAC found that the Tribunal had committed various errors in construing the SACA. In relation to the contemplation of foreign law whilst applying the SACA, the CAC stressed that thoroughness is a must. Specifically, it suggested that: “Section 8(a) has its origin in the jurisprudence of European Competition Law. As important a consideration as that may be the Supreme Court of Appeal has cautioned that our Act must be interpreted primarily with reference to its own language. Thus, while S 1(3) of the Act provides that when interpreting and

⁵⁸⁶ Ibid, para.142

⁵⁸⁷ Ibid, para.47

⁵⁸⁸ See Plessis, L. D. and Blignaut, L. (2009) “*Staying safe – dominant firms’ pricing decisions in industries where high prices do not attract entry*” Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, available from (www.compcom.co.za) accessed 22-08-2010, p.6 ; Parr, G. (2007) “South Africa: Excessive pricing – don’t get caught in the Mittal!” available from (<http://www.mondaq.com/article.asp?articleid=52022>) accessed 22-08-2010, p.6

applying the statute, appropriate foreign and international law may be considered, it is nonetheless ‘necessary to view the competition laws of other countries in their proper historical, social and institutional contexts’⁵⁸⁹.

The CAC indicated that when the Tribunal viewed the EU approach in *United Brands*, it seemed “cautious”. However, it found that the Tribunal’s approach did not illustrate a proper application of Section 8(a). More specifically, the CAC emphasised that the Tribunal favoured “market structure” over “price level”. It added that Section 8(a) prohibits only ‘excessive prices’ and not ‘ancillary conduct’ designed to take advantage of a particular market structure⁵⁹⁰. Consequently, the Tribunal seems to have rather developed on the prohibition stipulated under Section 8(a).

In fact, the CAC importantly suggested that the SACA rather presupposes a four-tiered test that ought to be followed. First, is to identify the actual price that is alleged to be excessive; second, to determine the “economic value” of the good or service in question; third, to discern whether the actual price exceeds the economic value and, if so, whether the difference is “unreasonable”; and, fourth, is to investigate whether such excessive price is detrimental to consumers. According to the CAC, the first two tiers are “factual” while the second two tiers are to be based on a “value judgement”⁵⁹¹.

Moreover, the CAC suggested that Mittal’s import parity pricing should not “*per se*” be “excessive” on the premise that the SACA primarily requires the investigator to establish that the actual price is higher than the economic value. It added that: “Only when there is no reasonable relation between the price and the value can the price be regarded as excessive. Whether the actual price is described or formulated on the basis of an IPP [import parity price] cannot, for the purposes of this determination, be definitive”. Hence, the Tribunal should have compared the actual price with economic value prior to deeming a price as excessive⁵⁹². The CAC then returned the case to the Tribunal for reappraisal in light of the four-step test⁵⁹³.

⁵⁸⁹ South African Competition Appeal Court’s decision dated 29th May, 2009, *Mittal Steel South Africa Ltd and Macsteel International B.V.* Complaint (Case 70/CAC/Apr07), paras.25-26

⁵⁹⁰ Ibid, paras.27-28

⁵⁹¹ Ibid, para.32

The South African approach to excessive pricing as such appears to be compatible with that of the CoJ in *United Brands* (as described in chapter four). Particularly, the CAC – akin to the CoJ’s approach – indicated that the test for determining excessive pricing should include a comparison between the actual costs and price of the goods or services under analysis. In addition, similar to the CoJ’s approach, the CAC implies that on some occasions it may be necessary as a comparator to compare the prices of the incumbent firm with the prevailing market ones or its competitors’. In fact, Sections 1(1)(ix), 8(a) of the SACA and the four-step test adopted by the CAC seem to *borrow* the EU’s approach to excessive pricing in *United Brands*.

Nevertheless, it is clear that the *Mittal* case as such generally illustrates how the practice of excessive pricing is *difficult* to assess in emerging economies⁵⁹⁴. This implies that *borrowing* the EU approach was *not* receptive (in comparative law terms) in South Africa at this stage. In fact, despite the fact that the CAC had identified the necessary four-step text as means for inquiry, it still remains equivocal as to how investigating authorities should determine economic value and, in turn, reasonableness in the relationship between the latter and the actual price. In fact, as some rightly suggest: “The CAC judgement is clearer on how *not* to assess excessive pricing than it is on how to actually assess it”⁵⁹⁵.

Moreover, the foregoing exemplifies that the success of legal borrowing not only ought to reflect the lending system’s culture, as Legrand⁵⁹⁶ and Montesquieu⁵⁹⁷ suggest, but more importantly, at least in the context of competition law, the degree of economic

⁵⁹² Ibid, para.44, emphasis added

⁵⁹³ However, the case has now been settled amicably between Harmony (complainant) and Mittal (defendant).

⁵⁹⁴ Greiss, M. (2010) *op.cit.*, pp.34-35. In fact, this is the case even in the developed world. That is why investigating this practice in the EU for instance is not prioritized.

⁵⁹⁵ Plessis, L. D. and Blignaut, L. (2009) “*Staying safe – dominant firms’ pricing decisions in industries where high prices do not attract entry*” Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, available from (www.compcom.co.za) accessed 22-08-2010, pp.6, 11, as cited in Greiss, M. (2010) *op.cit.*, pp.34-35

⁵⁹⁶ See Legrand, P. (1997) “The Impossibility of “Legal Transplants” (42), *Maastricht Journal of European and Comparative Law*, p.111, in Nelken, D. and Fest, J. (Eds.), (2001), “What “Legal Transplants”?”, *Adapting Legal Cultures*, p.60, as cited by Plessis, J. D. (2006) “Chapter 14 – Comparative Law and the Study of Mixed Legal Systems” *The Oxford Handbook of Comparative Law*, Reimann, M. and Zimmermann, R. (Eds.), OUP, p.487

⁵⁹⁷ See Montesquieu’s opinion as cited by Berkowitz, Pistor and Richard (2003), *op.cit.*, p.188

expertise reached in that system. In other words, the level of economic expertise of the borrowing system's competition authorities and courts should at least be at a *comparable* level with the lending system for success and receptivity of legal borrowing. Inevitably this factor was absent in the borrowing of the CoJ's approach of excessive pricing in South Africa.

Furthermore, the *Mittal* decision implies the difficulty in dealing with the practice even though economic expertise in South Africa may not be minimal in the field of competition law. In fact, economic expertise in South Africa is by no means to be compared with Egypt at this particular stage. The SACA was enacted as early as 1998 and the South African Competition Commission and Competition Courts are therefore 7-8 years older than Law No. 3/2005 and its Executive Regulations and the ECA respectively. Given this substantial difference, and while investigating the practice of excessive pricing in itself requires multifaceted economic analysis; the ECA and courts *a priori* may encounter even more hurdles in this case.

Accordingly, the Egyptian legislator may have adopted the *right* approach not to regulate the conduct of excessive pricing. Indeed, the lack of prohibition of such practice under Egyptian Competition Law is arguably, in itself, incompliant with Islamic law – as explored in the preceding chapter. Concurrently, however, *Shari'ah* would strongly condemn judicial errors (particularly type II errors; erroneous condemnations) – a likely outcome that may occur while investigating excessive prices at this stage of experience. Put differently, it is argued that the likely cause of prohibiting excessive pricing at this stage in Egypt (given the *Mittal* example) are type II errors that lead to the *injustice* of falsely accused defendants which, similar to the lack of prohibition of such practice, raises Islamic law concerns. For this reason, if the Egyptian legislator was to ever regulate excessive pricing, it would do so *only at a very later stage; when experience of the ECA and economic courts increases*.

With regards to below-cost margin squeeze, notwithstanding the (arguably) limited effect of the lack of its prohibition, it remains indispensable to prohibit it for Islamic law purposes. The question is how to do so? In South Africa, margin squeeze is prohibited in very general terms. Particularly Section 8(c) of the SACA prohibits a

dominant firm from engaging in an: “*Exclusionary act* [...] if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain”⁵⁹⁸. The wording of Section 8(c) as such is quite general to a degree that may cover margin squeeze through downstream below-cost pricing⁵⁹⁹.

However, it is argued that the Egyptian legislator may, instead of providing a general and separate stipulation, add another paragraph to Article 13(b) of the Executive Regulations prohibiting, in precise terms, the concerned form of margin squeeze. It is also perceived that *borrowing* from the EU system the *as efficient competitor* standard is important for two reasons. First, the test seems to provide a fair decision over whether or not the practice should be prohibited (although one should not preclude the complexities accompanying it) and; second, given the experience of the Commission in this respect, the ECA may request cooperation in relation to complex investigations. In fact, it is argued that capacity building, technical assistance, and cooperation in this respect may increase the degree of receptivity⁶⁰⁰.

Similar to the lack of an excessive pricing prohibition, employing an effects-based approach at this stage may be questionable due to the potential effects of errors that may derive from the lack of economic expertise in competition law. However, the ECA has done a *remarkable* job in employing such approach so far. A fine illustration is its economic analysis in the *Steel* study (where it assessed the *actual* effects of Ezz Group’s exclusivity practice on competition – as discussed in chapter four). Indeed this view adheres to Berkowitz, Pistor and Richard’s ideology (see quotation at the beginning of this part) in the sense that the effects-based approach in that case was *not imposed* by a foreign law; but is rather an approach that was selected by the Egyptian legislator and employed by the ECA in the *Steel* case (arguably inspired by the EU Commission’s initiative).

⁵⁹⁸ Section 8(c), South African Competition Second Amendment Act 39 of 2000

⁵⁹⁹ In *Senwes*, for instance, the Tribunal held that the practice of margin squeeze, although not in the form subject of this thesis, fell within the scope of s 8(c) of the SACA. See South African Competition Tribunal decision dated 3rd February, 2009, *Competition Commission v Senwes Ltd*, Case No. 110/CR/Dec06

However, unlike the case of excessive pricing, investigating the practice of margin squeeze involves less complex analysis even for emerging economies. See *Senwes* as an illustration.

⁶⁰⁰ The issues of capacity building, technical assistance and cooperation between the ECA and EU Commission will be dealt with in the following part.

Moreover, an effects-based approach is more favourable because it is likely to avoid type II errors (erroneously condemning pro-competitive practices) and their effects that may be substantial on the market; particularly in relation to falsely condemned firms. Specifically, the effects of judicial errors in this respect may arise when a firm adopts a practice that, although may raise competition law compliance concerns, yields pro-competitive benefits. This may discourage the erroneously condemned dominant firm(s) from engaging in pro-competitive practices in the future. Indeed type II errors are the likely outcome of a *per se* approach.

In fact, employing a *per se* approach to abuse of dominance – similar to not regulating excessive pricing at this stage or regulating it but increasing the likelihood of committing type II errors – may raise *Shari'ah* concerns on the basis that it prohibits a practice *only* if it generates *actual* negative effects on the society (as indicated in chapters three and four)⁶⁰¹ – an outcome that may not be attained through a *per se* approach. Consequently, to avoid type II errors and for Islamic law purposes, it is suggested to stick to an effects-based analysis. However, Egyptian investigating authorities should be *cautious*, particularly in relation to practices that may have *questionable* anti-competitive effects on the market, so as to avoid *injustice* in decisions⁶⁰².

The Egyptian system, by employing an effects-based approach to abuse of dominance as such, seems to reflect the EU Commission's initiative⁶⁰³. However, as indicated on many occasions earlier, and influenced by Islamic principles, it goes a step further to suggest that it is the *actual* effects that matter. As for excessive pricing, the Egyptian system adopts a different approach from that of the EU and Islamic laws at the time being, although it should be stressed that the investigation of such practice does not represent a priority in the EU. Indeed the fact that transplanting the EU approach of

⁶⁰¹ See for instance, Zaidan, A. K. (1994) "*Al Wajiz fi Usul Fiqh*" Beirut: Muassasah Risalah, pp.245-247, as cited by Hasan, Z. (2008) "*Islamic Perspective on the Competition Law and Policy*" available from: (<http://zulkiflihasan.files.wordpress.com/2008/07/islam-and-competition-policy.pdf>) accessed 20-09-2009, p.7

⁶⁰² Arguing in favour of avoiding judicial errors that may condemn "questionable practices", see Easterbrook, F. H. (1984) "The Limits of Antitrust" 63(1), *Texas Law Review*, p.15

⁶⁰³ Indeed the EU's approach to abuse of dominance is currently at a transitory stage. Nevertheless, the future priority and plan is to modernize Article 102 TFEU; or in other words, employ a full effects-based approach. See discussion on modernizing Article 102 in part 4.5.1 (chapter four).

excessive pricing (as developed by the CoJ in *United Brands*) at this stage *may not be receptive* – as the *Mittal* case highlights – may stand as robust evidence that the wording of competition rules enshrined in the EMAA does *not* imply that Egyptian Competition Law must be modelled on EU rules – as is the case with candidate states. On the contrary, the language used in the EMAA implies that it is merely the responsibility of Egypt to adopt its own competition law, so long as it is properly able to implement it (or give meaning to it).

Nonetheless, this does not mean that approximating Egyptian Competition Law with EU rules *may not be desirable*. On the contrary, the EU's desire to approximate Egyptian Competition Law with its own may be somehow implicit, since such cause would provide *comparable* treatment to EU investors in Egypt⁶⁰⁴. In fact, the EU Commission on some occasions emphasised the benefits of modelling competition laws of its trading partners with its own. For instance, in its Europe Mediterranean Partnership Review, the Commission stated that: “Other areas where convergence in legislation *would help contribute to meeting the objectives of the Association Agreements include [...] competition [...]*”⁶⁰⁵. More recently, it mentioned that: “All partners have acknowledged that harmonising their legislative and regulatory frameworks in areas such as [...] competition laws [...] *will facilitate their access to an enlarged market*”⁶⁰⁶.

Furthermore, it is believed that legal borrowing as such may play a role in attracting EU investors on the basis of diminished transaction costs. Inevitably this may be beneficial to the Egyptian economy⁶⁰⁷. Moreover, harmonization may diminish “costs of

⁶⁰⁴ In fact, this (arguably) represents part of the pressure posed by the EU on Egypt to adopt its own competition law. Particularly, on this, recall discussion on the Declarations on Article 34 of the EMAA in part 1.4.1 (chapter one).

⁶⁰⁵ EU Commission, (2001), “*The Barcelona Process, the Europe Mediterranean Partnership - 2001 Review*” available from (http://ec.europa.eu/external_relations/euromed/publication/review01_en.pdf). accessed 20-01-2008, p.20

⁶⁰⁶ EU Commission, (2006) “*Euro-Med Partnership, Regional Strategy Paper 2002-2006 and Regional Indicative Program 2002-2004*” Available from (<http://www.coppem.org/backoffice/downloadEuro/Strategy%20Paper%202002-06.pdf>). Accessed 24-01-2008, p.14

⁶⁰⁷ Geradin, D. and Petit, N. (2003) “Competition Policy and the Euro-Mediterranean Partnership” (8) *European Foreign Affairs Review*, pp.17-18

elaboration of domestic competition law regime”⁶⁰⁸. This means that borrowing the legal rule may not only be beneficial to Egypt and its economy, but also to EU investors and the case of EU/Egypt trade. However, recognizing that transplantation of an aspect such as the prohibition of excessive pricing may not be successful at this stage, one should rather direct the emphasis and attention on how the borrowing of such prohibition mechanism from the EU may be *receptive*, in case the Egyptian legislator wishes to contemplate this in the future.

Generally speaking, the receptiveness of legal transplants in the field of competition law necessitates and presupposes similarities in the level of economic expertise between the lending and borrowing states. Hence, it is advisable for emerging economies with newly born competition authorities like the ECA to recruit a group of economic experts in the field. Inevitably, the fact that the ECA is currently looking to employ some senior economists, as discussed in chapter three, is a step forward. As for the courts, specialism in competition law is suggested for judges.

The adoption of economic courts in Egypt indeed ensures specialism and enhances economic expertise. Nonetheless specialism in competition law in this sense is not attained to a great extent; compared to South Africa for instance, which appears to provide judges with speciality in competition law – Competition Tribunal and Competition Appeal Court. This is because Law No. 120 of 2008 issuing the Law establishing Economic Courts indicates the competency of economic courts in relation to competition-related disputes *among many other fields*⁶⁰⁹. Hence, it is suggested – at least at a later stage – to confine specialisation of economic courts to competition-related disputes. This may indeed hasten the enhancement of economic expertise and experience in competition law. Particularly, this may facilitate investigating the proposed category of margin squeeze and ensure successful deployment of an effects-based approach in Egypt in a manner that may increase credibility of the decision-

⁶⁰⁸ Ibid, p.18

⁶⁰⁹ Recall that other fields which fall within the scope of economic courts pursuant to Article 4 include: Company Law, Capital Market Law, Investment Law, Financial Leasing Law, Mortgage Finance Law, Intellectual Property Protection Law, Banking Law, Investment Companies Law, protection from Bankruptcy provisions in the Code of Commerce, Investor Protection Law Communication Regulation Law, Insurance Supervision, Securities Depository, Antidumping Laws and Electronic Signature Law.

making process among the business community. Concurrently, this raises the prospect of regulating excessive pricing in the future, should the Egyptian legislator wish to do so.

5.4 CAPACITY BUILDING, TECHNICAL ASSISTANCE AND COOPERATION AS MEANS FOR THE OPTIMAL IMPLEMENTATION OF EGYPTIAN COMPETITION LAW

Expertise, in general, in competition law needs to be enhanced in emerging economies with young competition authorities like the ECA for the purposes of ensuring the proper implementation of competition law. One method to do so, according to Dabbah, is by conducting training sessions that would equip young competition authorities' staff with a good understanding of competition law and policy. These sessions should, moreover, deal with competition law in practice and how legal and economic analysis is carried out⁶¹⁰.

Another method is by seeking technical assistance from developed countries' competition authorities. But what is meant by technical assistance as such? Technical assistance may be defined as: "The transfer of skills and know-how from one agency/jurisdiction to another"⁶¹¹. Technical assistance along with capacity building programs is usually offered by competition law regimes such as that of the EU and US. The aim of these programs is enable the ECA's staff to gain "first-hand" experience on how to deal with competition-related disputes⁶¹².

A further method, yet different from the former (technical assistance) – as will be delineated below - is cooperation between the ECA and competition authorities of the developed world. Surprisingly, the EMAA, followed by the ENP Action Plan, made no reference to cooperation or coordination between Egyptian and the EU investigating

⁶¹⁰ See Dabbah, M. M. (2010) "*International and Comparative Competition Law*" First Edition, CUP, pp.364-365

⁶¹¹ See *Capacity Building And Technical Assistance: Building Credible Competition Authorities in Developing and Transition Economies*, ICN Working Group on Capacity Building and Competition Policy Implementation, ICN 2nd Annual Conference Mérida, Mexico 23 – 25 June 2003.

⁶¹² Dabbah, M. M. (2010) "*International and Comparative Competition Law*" First Edition, CUP, pp.364-365

authorities on competition. One would have expected the ENP Action Plan to introduce some mechanisms that aim to enhance cooperation in this respect. Issues such as positive and negative comity should have been put in the agenda, as well as other means that promote cooperation between competition authorities. By reviewing, however, the Action Plan of EU-Egypt, one may observe that it is modest both in terms of harmonization and cooperation⁶¹³.

However, this does not necessarily signify that the EU Commission does not intend to cooperate with the ECA. In fact, Phillip Lowe, former DG Comp, already raised this matter in a speech. He recognized the necessity of cooperation with competition authorities of the EU's parties in trade agreements – referring particularly to the Euro-Mediterranean Association Agreements with Morocco and Tunisia. However, it is understood that cooperation may also extend to cover all of the EU's Mediterranean Partners (including Egypt)⁶¹⁴.

On the other hand, cooperation on the multilateral level is carried out by several institutions; most notably the International Competition Network ('ICN'), the Organisation for Economic Cooperation and Development ('OECD') and the United Nations Conference on Trade and Development ('UNCTAD'). The ICN is an international body that is entirely confined to the enforcement of competition policy. The OECD is a forum that frequently provides discussions on various debatable matters on competition law and enforcement. The UNCTAD plays a leading role in cooperation on competition law matters with particular emphasis on developing countries⁶¹⁵.

Inevitably, the gains from cooperation between competition authorities in general are quite substantial, whether in terms of knowledge and understanding or harmonization.

⁶¹³ Ghoneim, A., Greiss, M. and Holmes, P. (2008) "Chapter four – Competition" FEMISE Project No FEM31-08, *Examining the Deep Integration Aspects of the EU-South Mediterranean Countries: Comparing the Barcelona Process and Neighbourhood Policy, the Case of Egypt* Contributors: Mona El Garf, Michael Gasior, Ahmed F. Ghoneim, Peter Holmes, Javier López González, Dagmar Hertova, Sherine H. Bayoumi, Mourad Greiss, and Radwa Khater, available from: (<http://www.femise.org/PDF/ci2006/FEM31-08.pdf>) Accessed 20-12-2009, p.96

⁶¹⁴ Lowe, P. (2006) "International cooperation between competition agencies: Achievements and challenges" Speech in the 4th Seoul International Competition Forum, 5th September, 2006, available from: (http://ec.europa.eu/competition/speeches/text/sp2005_021_en.pdf) accessed 04-08-2010, p.3

⁶¹⁵ Ibid., p.3; Tineo, M. C. (2006) "International Competition Network update" available from: (<http://www.ftc.gov/bc/international/docs/03Intro-ftc.pdf>) accessed 05-08-2010

Commenting on such benefits, an OECD study mentions: “Peer review may achieve a surprising degree of practical, informal consensus, and even where this is not the case, the process serves a useful purpose by identifying precise areas of disagreement, and, potentially, better understanding of those areas where convergence is not feasible or desirable”⁶¹⁶.

Furthermore, according to Lowe, the accomplishments of international cooperation so far have been “remarkable”. In relation to the EU Commission’s cooperation, he distinguishes between two pillars of cooperation: First, “case cooperation”, and second, “policy dialogue”. Some may confuse “case cooperation” with technical assistance sought by developing countries’ competition authorities. The difference, however, is clear in that the former is only concerned with cases that are dealt with jointly between a developed country’s competition authority and that of another nation i.e. cases that affect the interests of two or more countries. The Commission, for instance, cooperated with several competition authorities on joint competition-related disputes. Particularly, it cooperated with the South Korean Fair Trade Commission on several aspects of abuse of dominance such as that in relation to the settlement of the Microsoft case in 2005⁶¹⁷. While technical assistance, on the other hand, is only concerned with a competition-related dispute(s) (or legal issue) that affects the interests of the developing country at stake and whereby the latter seeks expertise from a developed country’s competition authority. As for “policy dialogue”, it is a form of cooperation that is merely concerned with any future policy amendments. The Commission also cooperated with various competition authorities on policy-related issues that concern competition law reforms and experiences in dealing with practices⁶¹⁸.

In fact, technical assistance from the EU Commission is particularly important to the ECA for the purposes of enhancing economic expertise and experience in competition law implementation. This may in turn hasten Egypt’s preparations for regulating

⁶¹⁶ OECD (2000), *International Options to Improve the Coherence Between Trade and Competition*, COM/TD/DAFFE/CLP(99)102/Final, 10 February, Joint Group on Trade and Competition, Paris: Organisation for Economic Co-operation and Development, p.3

⁶¹⁷ For information on the Microsoft case, see South Korean Fair Trade Commission (2005) “*The findings of the Microsoft case*” available from: (http://ftc.go.kr/data/hwp/micorsoft_case.pdf) accessed 04-08-2010

⁶¹⁸ Lowe (2006), *op.cit.*, pp.3-4

excessive pricing, should the Egyptian legislator contemplate legal reform on this matter in the future. Not least, it is also vital to seek technical assistance from the Commission in relation to the investigation of margin squeeze practices and deployment of an effects-based approach in abuse of dominance in general; specifically since both the proposed reform and method of assessment of abuse of dominance in general seem to coincide with the Commission's approach. In fact, technical assistance as such would not merely benefit the Egyptian economy (e.g. reduction of judicial errors, increasing credibility of the ECA, etc.), but also EU investors in Egypt and, in turn, FDI and EU/Egypt trade.

Nevertheless, many challenges may pose a barrier to international cooperation. According to Lowe "Cooperation will be easier if there is broad consensus between authorities and in areas where they share common interests. By contrast, cooperation will be rather tricky and burdensome in controversial areas, in particular if the underlying rational and objectives of competition laws differ considerably (e.g. total versus consumer welfare standard; *per se* rules of abusive conduct versus pure economic effects approach)"⁶¹⁹.

However, these hurdles seem to presuppose that competition rules of the two cooperating parties are distinct and indeed have different objectives. As such, they may not obstruct cooperation between the Commission and ECA in relation to abuse of dominance on the basis that the latter showed intentions to employ an effects-based approach that is more or less expected to coincide with the former's future approach. In the same vein, these challenges may not be applicable to the suggestion of prohibiting excessive pricing in the future in Egypt; so long as that approach shall be modelled on the EU's approach in *United Brands* (in the event of future contemplation). In this sense, one may argue that the Commission and ECA arguably *share common interests*.

To conclude this part, the objective of the proposed reform and approach is, by 2020, to regulate the practice of margin squeeze through below-cost downstream pricing and to have the option to regulate the practice of excessive pricing under Egyptian Competition

⁶¹⁹ Ibid, p.4

Law using the method employed by the CoJ in *United Brands* and followed by the CAC in *Mittal*. However, this latter resort should not be used unless such practice poses an actual threat to the economy. Not least, the objective is to also enable the ECA and economic courts to successfully employ an effects-based approach to abuse of dominance. The success of such reform and approach will very much depend on the degree of economic expertise reached by 2020. These objectives, if properly attained, should ensure that the Law No. 3/2005 and its Executive Regulations are compliant with Islamic law and that the Egyptian economy is not hindered (at least from this direction).

5.5 CONCLUSION

This chapter explored the potential effects of the lack of excessive pricing prohibition, the absence of a prohibition of margin squeeze through below-cost downstream pricing, and the deployment of an effects-based approach at this stage in the Egyptian economy. It is perceived that notwithstanding the potential effects that may derive from the lack of excessive pricing prohibition, the Egyptian legislator seems to have adopted the *right* approach *not to regulate it at this stage*. Evidence for validity of the legislator's approach as such is the fact that the Tribunal and CAC in *Mittal* appear to have encountered difficulties in dealing with the appraisal of the conduct⁶²⁰. Indeed, the lack of its prohibition may in itself raise Islamic law concerns.

Equally condemned under *Shari'ah* principles, however, are judicial errors that may falsely condemn defendants (type II errors) on the basis of *injustice*. In fact, had the legislator regulated excessive pricing at this stage, and given the complexities in calculations of a *competitive price* - as *Mittal* demonstrates - this may have led to type II errors in the near future. Indeed, aside from these *Shari'ah* concerns, the likely costs of committing this category of errors may outweigh the detrimental effects that may arise from the lack of the practice itself. For this reason, regulating excessive pricing is not ideal at this stage due to the lack of sufficient economic expertise in competition law. Nevertheless, the Egyptian legislator should not entirely abandon such initiative in the

⁶²⁰ Greiss, M. (2010) *op.cit.*, p.35

future so long as the ECA and courts gain the necessary experience and economic expertise in the field and that such practice continues to pose a threat to the national economy.

Furthermore, the lack of recognition of margin squeeze through below-cost pricing may pose some potential effects in the Egyptian economy. However, it is argued that these effects are not severe. Nonetheless, for Islamic law purposes, and given that investigating such practice involves less sophisticated analysis compared with excessive pricing, it is recommended that the Egyptian legislator regulate this event in particular through adding a paragraph to Article 13(b) of the Executive Regulations. It is also suggested to employ the EU's *as efficient competitor* standard while analysing the anti-competitiveness of such practice.

As for employing an effects-based analysis, and although it is often argued that it may not be the best of approaches to emerging economies with newly introduced competition laws and the least implementation experience, the ECA has shown competence in employing such approach in the *Steel* study. Therefore, an effects-based approach may still be the suggested method of analysis; so long as a *cautious* approach is adopted in relation to practices that generate *questionable* anti-competitive effects⁶²¹.

However, for the purposes of considering the three proposals in the future, increasing the level of economic expertise in competition law in Egypt remains vital. Recognizing the necessity of such factor, the ECA indeed shows intentions to increase the level of economic expertise through attempting to recruit a senior economist (supposedly to share the same roles as the CCE in the EU Commission). In the same vein, the Egyptian government introduced the Law establishing Economic Courts. Nonetheless, one drawback to this latter law is that competition-related disputes, although now subject to the exclusive jurisdiction of economic courts, are merely among several other disputes that fall under these courts' jurisdiction. Drawing on the South African regime, it may be suggested to select a group of judges who shall only be specialised in competition-related disputes.

⁶²¹ Greiss, M. (2010) *op.cit.*, p.35

Not least important is cooperation between the ECA and competition authorities of the developed world. Aside from cooperation that may be offered on the multilateral level by the ICN, OECD, and UNCTAD, the ECA may seek technical assistance from the EU Commission. Particularly, the ECA may request technical assistance (or ‘case cooperation’ – where applicable) from the Commission while investigating abusive practices that employ an effects-based approach – given that the ECA and Commission *share common interests* in this respect. Furthermore, the Egyptian government may request ‘policy dialogue’ from the Commission, should it consider providing a comprehensive treatment of margin squeeze or transplanting the EU’s approach to excessive pricing in the future.

GENERAL CONCLUSION

GENERAL CONCLUSION

EU/Egypt trade relations appear to have encouraged Egypt to enact its own competition law. In fact, the debate over the enactment of competition law, among the Egyptian Parliament, arose at a time when the negotiation process of the EMAA in Barcelona had commenced (mid-1990s). However, the enactment of competition law in Egypt was not solely attributed to the EU's implicit encouragement per se. The privatisation programme along with the desire to comply with the *Shari'ah* principles that prohibit monopoly, by virtue of Article 2 of the Constitution, arguably signifies that the Egyptian government had a long-term commitment to introduce competition law. It is, nonetheless, perceived that the negotiation process of the EMAA hastened the enactment of such law.

The wording of the EMAA does not require or imply that Egypt should transplant EU competition rules. The EU merely encouraged Egypt to introduce its own competition law so as to offer EU investors a comparable treatment. It is thus perceived that it was Egypt's responsibility to adopt its own competition law so long as it is able to properly implement it. Nevertheless, it remains implicit that it would have been *desirable* from the EU's part for Egypt to enact competition rules that are modelled on EU ones so as to reduce transaction costs for EU investors. This is rationalized by the fact that Article 34(1)(ii) of the EMAA is *only* applicable if the abusive conduct at stake generates an effect on trade on the EU or Egypt as a whole or a substantial part of either of them. Otherwise, the national competition law where the conduct was exercised shall be applicable.

Although Ordoliberalism was (arguably) a major influence on those who drafted competition law in Europe, it does not appear to have any constitutional underpinnings. In other words, EU investigating authorities are not compelled to abide by the Ordoliberal themes on competition. In fact, the EU is arguably departing nowadays from these themes in relation to abuse of dominance. Particularly, the Commission intends to transform the appraisal of abusive practices under Article 102 TFEU into an effects-based approach. Likewise, Egypt is not obliged to abide by the principles of *Shari'ah* (precisely the principles of *no-harm* and *maslahah*) in relation to competition

law. Despite the wording of Article 2 of the Egyptian Constitution, there is no direct evidence that the Islamic principles should be reflected within the Egyptian Legal System. Nevertheless, it is argued that Article 2 implies the desire to do so (be it in theory or practice).

The Egyptian Competition Regime (be it the drafters of Law No. 3/2005 and its Executive Regulations or the ECA)⁶²² was arguably influenced by the EU Commission's initiative to employ an effects-based approach to abusive practices. However, the Egyptian system, inspired by the Islamic principles on market intervention, seems to go a step further to adopt an *actual* effects standard⁶²³. Nevertheless, an effects-based analysis to competition law is often criticised by many for lacking predictability and legal certainty and for yielding wide discretionary powers to investigating authorities. In addition, many – including some U.S. Supreme Court judgements – argue that the process of determining a practice's effects is quite complex, if at all conceivable.

However, these arguments may be countered by the fact that this form of analysis, as opposed to a *per se* approach, raises the chances of avoiding the undesired type II errors (erroneously condemning pro-competitive practices). Nonetheless, economic expertise remains a cornerstone for employing an effects-based approach in the manner that prevents these type II errors. That said; the EU Commission appointed a CCE in 2001. The ECA, inspired by the EU Commission's approach *per se*, is nowadays looking to recruit a senior economist. In fact, the Egyptian government enacted the law establishing economic courts in 2008 for a similar purpose (as it appears).

Nevertheless, the foregoing argument on the necessity of economic expertise for employing an effect-based analysis suggests that deploying such approach in Egypt at this early stage of competition law implementation may have potential effects in the economy. Particularly employing such approach may lead to judicial errors that may eventually impede FDI and discourage trade that are key pillars of the economy. Thus

⁶²² See the discussion of an effects-based approach under Egyptian Competition Law in part 4.5.2 (chapter four).

⁶²³ Recall the discussion of the ECA's approach in the *Steel* case (part 4.5.2 – chapter four).

these effects may directly be passed on to the economy. However, the fact that the ECA has shown some promising capabilities in its *Steel* study implies otherwise. It suggests that the ECA should stick by an effects-based approach so long as practices that generate *questionable* anti-competitive effects are treated cautiously.

It is, moreover, distinctive that the Egyptian Competition Law, as opposed to EU rules (although only investigated in the latter system in exceptional circumstances), does not prohibit excessive pricing. This is indeed notwithstanding the fact that excessive pricing (arguably) constitutes a direct condemnation of Islamic law principles. The Egyptian legislator seems to have adhered to the arguments against regulating this practice. However, given the likelihood of success of excessive pricing in emerging economies in general on the basis of high concentration levels, the lack of prohibition of such practice may have potential effects in the Egyptian economy. Specifically, excessive pricing directly harms consumer welfare and leads to allocative inefficiency in a manner that may have spill over effects on the economy.

However, the *Mittal* case generally illustrates how the practice of excessive pricing is *difficult* to assess; at least at the early stages of competition law implementation. Indeed, the South African approach had attempted to borrow the CoJ's analysis in *United Brands* but apparently the latter was not receptive due to the complexity of the appraisal necessary in relation to the investigation of excessive pricing disputes. While South Africa had introduced its competition law in 1998 (7-8 years older than Egypt); and in turn economic expertise therein inevitably surpasses that in Egypt, transplanting the relevant CoJ's rule may not *a priori* be receptive.

Precisely, the illustration of *Mittal* provides three imperative observations. First, it explains why the Egyptian legislator did not regulate such practice under Law No. 3/2005 at this particular stage. In fact, had the Egyptian legislator prohibited excessive pricing, this may have increased the chances of committing type II errors at the present stage. While, as mentioned earlier, *Shari'ah* condemns excessive pricing, it would simultaneously condemn false accusations (type II errors) on the basis of *injustice*. This means that the lack of excessive pricing prohibition may, to some extent, be justified under Islamic law at this stage.

Second, but not least, *Mittal* shows that the wording of competition rules enshrined in the EMAA does *not* imply an obligation on Egypt to transplant EU rules. Otherwise, EU investors may not have a fair treatment in Egypt – a cause that was patently not the intention of the EMAA’s drafters. Third, it sends a message to comparative lawyers who share particular interest in competition law that aspects such as culture, society, religion etc. are not the only obstacles for receptivity of legal transplants; economic expertise should also be given due consideration. Nonetheless, given the potential effects that may be generated from excessive pricing and the Islamic law concerns it raises, it may still be suggested to re-consider regulating excessive pricing in the future; so long as this is accompanied by sufficient economic expertise and that such practice poses *actual threat* to the economy.

Furthermore, the Egyptian legislator did not seem to recognize the fact that margin squeeze does not always appear in the form of *constructive* refusal to deal. Particularly, Egyptian Competition Law lacks a prohibition for the event where a vertically integrated firm that is dominant in the upstream market strategically chooses to avoid the prohibition of *constructive* refusal to deal under Article 13(b) of the Executive Regulations by squeezing its competitor(s) margin(s) in the downstream market through selling its retail product at below-cost prices. Although the potential effects of such practice in Egyptian economy are (arguably) limited to a certain extent, it raises Islamic law concerns on the basis of its incompatibility with the *Shari’ah* principle of fairness since it is likely to exclude competitors from the market. The practice also may be condemned under *Shari’ah* since the latter relies on intentions and that the concerned incumbent (in this event) would not have any intention other than driving its competitors from the market. In fact, it is on this basis that it is suggested to regulate such practice through adding another paragraph to Article 13(b).

For the purposes of endorsing the foregoing reforms in the future, increasing the degree of economic expertise in Egypt remains a key pre-requisite for maintaining a proper implementation of its competition law and for avoiding potential effects in the economy. At this stage, however, cooperation and seeking technical assistance from competition authorities of the developed world (particularly the EU Commission) is recommended. Specifically, technical assistance may help avoid type II errors in

competition-related disputes; be it in relation to margin squeeze or any other abuse where the ECA employs an effects-based approach. In addition, the Egyptian government may request *policy dialogue* from the Commission, should it consider transplanting the EU's approach for excessive pricing and margin squeeze in the future.

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ANNEXES

ANNEX 1

LAW NO. 3 OF 2005

**PROMULGATING THE LAW ON THE
PROTECTION OF COMPETITION AND THE
PROHIBITION OF MONOPOLISTIC PRACTICES**

LAW NO. 3 OF 2005
PROMULGATING THE LAW ON THE
PROTECTION OF COMPETITION AND THE PROHIBITION OF
MONOPOLISTIC PRACTICES [AS AMENDED BY LAW NO. 190/2008]

In the name of the People

The President of the Republic,

The People's Assembly has decided the following law and we hereby promulgated it:

(Article One)

This Law shall apply with regards to the protection of competition and the prohibition of monopolistic practices.

(Article Two)

The Prime Minister is the minister competent to give effect to the provisions of this Law.

(Article Three)

The Executive Regulations of this Law shall be issued by a Prime Ministerial Decree within one month, from the date of the entry into force of this Law.

(Article Four)

This Law shall be published in the Official Gazette, and shall enter into force after three months from the following day of the date of its publication.

This law shall be stamped by the seal of the State and executed as one of its laws.

Issued by the Presidency of the Republic on 6 Moharam, 1426 H. (Corresponding to 15 February, 2005)

Hosni Mubarak

THE LAW ON THE PROTECTION OF COMPETITION AND THE PROHIBITION OF MONOPOLISTIC PRACTICES

Article 1

Economic activities shall be undertaken in a manner that does not prevent, restrict or harm the freedom of competition in accordance with the provisions of the Law.

Article 2

For the application of this Law, the following terms and phrases shall have the meanings indicated next to each of them:

- a) **Persons:** Natural and juristic persons, economic entities, unions, financial associations and groupings, groups of persons, whatever their means of incorporation, and other related parties as set forth in the Executive Regulations concurrently with the objectives and provisions of this Law.
- b) **Products:** Goods and services.
- c) **The Authority:** The Authority for the Protection of Competition and the Prohibition of Monopolistic Practices established in accordance with the provisions of this Law.
- d) **The Board:** The Board of Directors of the Authority for the Protection of Competition and the Prohibition of Monopolistic Practices.

Article 3

The relevant market, in the application of the provisions of this Law, is the market that consists of two elements, namely, the relevant products and the geographic area. Relevant products are products considered to be practical and objective substitutes to each other. The geographic area means a certain geographical territory where competition conditions are homogenous while taking into consideration the potential opportunities for competition, all in accordance with the criteria set out by the Executive Regulations in a manner consistent with the objectives and provisions of this Law.

Article 4

In the application of the provisions of this Law, dominance in a relevant market is the ability of a Person, holding a market share exceeding 25% of the aforementioned market, to have an effective impact on prices or on the volume of supply on it, without his competitors having the ability to limit it.

The Authority shall determine the situations of dominance according to the procedures provided for in the Executive Regulations of this Law.

Article 5

The provisions of this Law shall apply to acts committed abroad should these acts result into the prevention, restriction or harm of the freedom of competition in Egypt and which constitute crimes under this Law.

Article 6

Agreements or contracts between competing Persons in any relevant market are prohibited if they are intended to cause any of the following:

- a) Increasing, decreasing or fixing prices of sale or purchase of products subject matter of dealings.
- b) Dividing product markets or allocating them on grounds of geographic areas, distribution centers, type of customers, goods, market shares, seasons or time periods.
- c) Coordinating with regard to proceeding or refraining from participating in tenders, auctions, negotiations and other calls for procurement.
- d) Restricting processes of manufacturing, production, distribution, or marketing of goods or services. This includes restricting product type or volume or limiting the availability thereof.

Article 7

Agreements or contracts between a Person and any of its supplier or clients are prohibited if they are intended to restrict competition.

Article 8

A Person holding a dominant position in a relevant market is prohibited from carrying out any of the following:

- a) Undertaking an act that leads to the non-manufacturing, or non-production or the non-distribution of a product for a certain period or certain periods of time.
- b) Refraining to enter into sale or purchase transactions regarding a product with any Person or totally ceasing to deal with him in a manner that results in restricting that Person's freedom to access or exit the market at any time.
- c) Undertaking an act that limits distribution of a specific product, on the basis of geographic areas, distribution centers, clients, seasons or periods of time among Persons with vertical relationships.
- d) To impose as a condition, for the conclusion of a sale or purchase contract or agreement of a product, the acceptance of obligations or products unrelated by their very nature or by commercial custom to the original transaction or agreement.
- e) Discriminating in selling or purchasing prices or in terms of transaction between sellers or buyers whose contractual positions are similar.
- f) Refusing to produce or provide a product that is circumstantially scarce when its production or provision is economically possible.
- g) Dictating on Persons dealing with him not to permit a competing person to have access to their utilities or services, despite this being economically viable.

- h) Selling products below their marginal cost or average variable cost.
- i) Obliging a supplier not to deal with a competitor.

The Executive Regulations shall set out the conditions and procedures for implementing the provisions of this Article.

Article 9

The provisions of this Law shall not apply to public utilities managed by the State.

The Authority may, upon the request of the concerned parties, exempt some or all the acts provided for in articles 6, 7 and 8 regarding public utilities that are managed by companies subject to the Private Law where this is in the public interest or for attaining benefits to the consumers that exceed the effects of restricting the freedom of competition. This shall be done in accordance with the regulations and procedures set out by the Executive Regulation of this Law.

Article 10

The Cabinet of Ministers may, after taking the opinion of the Authority, issue a decree determining the selling price for one or more essential products for a specific period of time.

Any agreement concluded by the Government for the purposes of the implementation of these prices shall not be considered an anti-competitive practice.

Article 11

There shall be established an authority called “The Authority for the Protection of Competition and the Prohibition of Monopolistic Practices”. The Authority shall be located in Cairo and shall have the public juristic personality. The Authority shall be affiliated to the Competent Minister and shall have, in particular, the following powers:

- (1) Receiving requests for inquiry, inspection, collecting information or issuing orders to initiate such actions in relation to anti-competitive agreements and practices. This shall be done in accordance with the procedures set out by the Executive Regulations.
- (2) Receiving notifications mentioned in the second paragraph of Article 19 thereof.

The Executive Regulations of this Law shall specify the notification date and data, documents attached thereto and procedures of its submission.

- (3) Persons shall provide the Authority with the required data, papers, or documents necessary for the exercise of the competence thereof within the time set by the authority.
- (4) Taking the measures stipulated in Article 20 of this Law.
- (5) Giving its opinion on draft laws and regulations relating to the regulation of competition.

- (6) Coordinating with its counterparts in other countries on matters of common interest.
- (7) Organizing training and educational programs with a view of creating awareness about the provisions of this Law and free market principles in general.
- (8) Issuing periodicals containing decisions, recommendations, procedures and measures adopted and pursued by the Authority as well as other matters relating to the Authority.
- (9) Preparing an annual report on the activities of the Authority and its future plans and recommendations to be submitted to the Competent Minister upon its approval by the Board of Directors. A copy thereof shall be sent to the People's Assembly and the Shura Council.

The Executive Regulations of this Law shall determine the procedures to be followed by the Authority to investigate and prove acts that are deemed violation of the provisions of this Law.

Article 12

The Authority shall be managed by a Board of Directors the composition of which shall be formulated by virtue of a decree of the Competent Minister as follows:

- (1) A full-time Chairperson with distinguished experience.
- (2) A Counsellor from the State Council, holding a vice-president rank, to be chosen by the President of the State Council.
- (3) Four members representing the concerned ministries to be nominated by the Competent Minister.
- (4) Three specialists and expert members.
- (5) Six members representing the General Federation of the Chambers of Commerce, the Egyptian Federation of Industries, the Banking Federation, the General Federation for Civil Associations, the General Federation for Consumer Protection and the Egyptian General Union of Labour. Each Federation/Union shall appoint its own representative.

The Board shall be appointed for four years which may be renewed for another term.

The Decree on the formation of the Board of Directors shall contain the remuneration of the Chairperson and Board Members.

Article 13

The Board shall convene upon an invitation of its Chairperson at least once every month and whenever the necessity so requires. The meetings of the Board shall be valid with a quorum of ten members and the resolutions shall be passed with the majority of votes of its members.

A Board member shall not be eligible to take part in the deliberations or voting with regard to a case under the consideration of the Board, if he/she has an interest in it, or if he/she is a relative to any of the parties up to the fourth degree, or if such member currently represents or has represented any of the parties.

The Board may invite to its meetings specialists it wishes to seek their assistance. Such specialists shall not have a counted vote.

The Executive Regulations shall specify the competences of the Board in accordance with the provisions of this Law and the procedures for the invitation to its meetings and its operational rules.

Article 14

The Authority shall have an independent budget following the model of Public Service Authorities. Any surplus in the budget shall be forwarded from one fiscal year to another. The resources of the Authority consist of the following:

- (1) Appropriations designated to the Authority in the State General Budget.
- (2) Grants, donations and any other resources accepted by the Board and which do not contradict with its goals.
- (3) Revenues from the fees provided for in this Law.

Article 15

The Authority shall have a full-time Executive Director whose appointment, remuneration and competences shall be decreed by the Competent Minister upon the recommendation of the Chairperson of the Authority.

The Executive Director shall represent the Authority before courts and third parties.

The Executive Director shall attend the Board meetings but shall be ineligible to vote.

The Board of Directors of the Authority shall issue regulations concerning the organization of the work in the Authority and setting out the financial and administrative rules pertaining to its employees, without being restricted by the rules and regulations applicable to State employees. Such regulations shall be decreed by the Competent Minister.

Article 16

The employees of the Authority are prohibited to disclose any information, data or the sources thereof, in relation to cases falling under the scope of this law which are submitted or circulated during review, taking actions and issuing decisions in such cases.

These information and data as well as their sources shall not be used for any purposes other than those for which they were submitted.

Employees of the Authority are prohibited to work with Persons that were subject to examination or are in the process of examination on, for a period of two years from the end of their employment.

Article 17

The employees of the Authority, who shall be specified by virtue of a decree issued by the Minister of Justice, in agreement with the Competent Minister and upon the recommendation of the Board, shall be granted the status of law enforcement officers in applying the provisions of this Law.

Such employees shall be entitled to review records and documents, as well as to obtain any information or data from any governmental or non-governmental authority for the purpose of examining cases considered by the Authority.

Article 18

The Executive Regulations shall determine the categories of fees payable to the Authority for the services it renders. Such fees shall not exceed ten-thousand Egyptian Pounds per case.

Article 19

Any Person may report to the Authority any breach of the provisions of this Law. Persons whose annual turnover of the last balance sheet exceeded one hundred million pounds shall notify the Authority upon their acquisition of assets, proprietary or usufructuary rights, shares, establishment of unions, mergers, amalgamations, appropriations, or joint management of two or more persons according to the rules and procedures set forth in the Executive Regulations of the current Law

Article 20

Upon establishing a breach of any of the provision of Articles 6, 7 and 8 of this Law, the Authority shall order the violator to readjust his position and to redress the violation forthwith or within a period of time to be specified by the Board; otherwise the agreement or contract in breach of Articles 6 and 7 of this Law will be considered void.

The Board may issue a decision to stop the prohibited practice immediately or after the lapse of the said period of time without readjustment of position or redress for violation.

The above shall apply without prejudice to the liability arising from such breaches.

Article 21

Criminal lawsuits or any procedure taken therein shall not be initiated in relation to acts violating the provisions of this Law, unless a request of the Competent Minister or the person delegated by him is presented.

The Competent Minister or the person delegated by him may settle with regard to any violation, before a final judgment is rendered, in return for the payment of an amount not less than double the minimum fine and not exceeding double its maximum.

The settlement shall be considered a waiver of the criminal lawsuit filing request and shall result in the lapse of the criminal lawsuit relevant to the same case subject of suing.

Article 22

Without prejudice to any harsher penalty provided for in any other law, whoever violates the provisions of Articles 6, 7, 8 hereof shall be punished by a fine of not less than one hundred thousand pounds and not more than three hundred million pounds. The minimum and maximum limits of the fine shall be doubled in case of recurrence.

Article 22(bis)

Shall be punished with a fine of not less than ten thousand pounds and not more than a hundred thousand pounds any person who:

1. Fails to give the notification described in the second paragraph of Article 19 hereof, or
2. Fails to provide the Authority with any data, papers, or documents provided for in the third paragraph of Article 11 hereof.

Without prejudice to any harsher punishment, the penalty shall be a fine of not less than twenty thousand pounds and not more than two hundred thousand pounds in case false data, papers, or documents were knowingly provided to the Authority

Article 22(bis)

Without prejudice to any harsher penalty provided for in the Law, shall be penalized by a fine of not less than twenty thousand pounds and not more than five hundred thousand pounds whoever fails to abide by the decisions rendered by the Authority in accordance with Article 20 hereof.

Both the minimum and maximum limits of the penalty shall be doubled in case of recurrence.

Article 23

Without prejudice to any more stringent penalty stipulated in any other Law, the breach of the provisions of Article 16 of this Law shall be sanctioned by a fine not less than ten-thousands Egyptian Pounds and not exceeding fifty-thousands Egyptian Pounds.

Article 24

Final judgments of conviction regarding the actions stipulated in Article 22 of this Law shall be published in the Official Gazette and in two wide spread daily newspapers, at the convicted person's expenses.

Article 25

The person responsible for the actual management of the juristic person in breach shall be subject to the same penalties stipulated for the acts committed in breach of the provisions of this Law, if it has been established that such person had actual knowledge of such breach and if his default on assuming the duties of his office as the responsible manager has contributed to the breach.

The juristic person shall be jointly liable for the payment of the fines and compensation ruled, if the breach has been committed by one of its employees, acting in the name or on behalf of the juristic person.

Article 26 (Added by Law No. 193/2008)

In case of committing any of the crimes mentioned in Articles (6) and (7) of this Law, the court may exempt, up to the half of the sanction decided thereby, violators who take the initiative to inform the Authority of the offence and submit the supporting evidence, and for those whom the Court considers to have contributed to disclosing and establishing the elements of the offense at any stage of inquiry, search, inferences gathering, interrogation and trial processes.

ANNEX 2

PRIME MINISTERIAL DECREE

NO. 1316 OF 2005

ISSUING THE EXECUTIVE REGULATIONS OF

PROTECTION OF COMPETITION AND

PROHIBITION OF MONOPOLISTIC PRACTICES LAW

NO. 3 OF 2005

PRIME MINISTERIAL DECREE
NO. 1316 OF 2005
ISSUING THE EXECUTIVE REGULATIONS OF PROTECTION OF
COMPETITION AND
PROHIBITION OF MONOPOLISTIC PRACTICES LAW NO. 3 OF 2005
[AS AMENDED BY PRIME MINISTERIAL DECREE NO. 2957/2010]

The Prime Minister

After reviewing the Constitution,

The Law concerning the Protection of Competition and Prohibition of Monopolistic Practices issued by law No. 3 of 2005,

And in accordance with the view of the Council of State
Decides

Article (1)

There shall come into force the provisions of the executive regulations of the Protection of Competition and Prohibition of Monopolistic Practices law issued by law No. 3 of 2005 hereby attached.

Article (2)

This Decree shall be published in the Official Gazette and shall be enforced as of the following day of its publication.

16 August 2005

Dr. Ahmed Nazif

**THE EXECUTIVE REGULATIONS FOR THE LAW CONCERNING THE
PROTECTION OF COMPETITION AND PROHIBITION OF MONOPOLISTIC
PRACTICES
ISSUED BY LAW NO. 3 OF 2005**

**PART ONE
GENERAL RULES AND DEFINITIONS**

**CHAPTER ONE
GENERAL RULES**

Article 1

In the application of the provisions of these Regulations the law means the Law of Protection of Competition and the Prohibition of Monopolistic Practices issued by the Law No. 3 of 2005 and the Competent Minister means the Prime Minister.

The Authority means the Authority for the protection of competition and prohibition of monopolistic practices established in accordance with the provisions of the law and the board means the board of directors of the Authority for the protection of competition and prohibition of monopolistic practices.

Article 2

Economic activities shall be undertaken in a manner that does not prevent, restrict or harm the freedom of competition in accordance with the provisions of the Law and these Regulations.

Article 3

The provisions of the Law and these Regulations shall apply to all acts including practices, contracts or agreements committed abroad, which constitute crimes according to the Law if they prevent, restrict or harm the freedom of competition in Egypt.

CHAPTER TWO

DEFINITIONS

Article 4

In the application of the Law and these Regulations, the words and the phrases stipulated in the following articles shall have the meanings set out for each of them.

Article 5: Persons

Persons mean natural or juristic persons, economic entities, unions, federations, associations and financial grouping, whatever the method of their establishment, mechanisms of their financing, their nationalities, head quarters or main centers of activities.

Persons referred to in the first paragraph include, the related parties that are composed of two or more persons, each of them has an independent legal personality, where the majority of stocks or shares of one of them is owned, directly or indirectly, by the other party or where the majority of stocks or shares in both parties are owned by one party.

Related parties also include the person or persons who are subject to the actual control of another person. Actual control means every arrangement, agreement or ownership of stocks or shares, regardless of its percentage, in a manner that leads to the control of the management or decisions-taking.

Article 6: The Relevant Market

The relevant market means the market that consists of two elements: the relevant products and the geographical area. Each of these elements is determined as follows:

First: The relevant products: They are the products that can be considered, from the consumers' point of view, practical and objective substitutes to each other. In determining such products the following criteria, in particular, shall be taken into consideration:

1. The resemblance of the products in the characteristics and usage.
2. The probability that the buyers shift from a certain product to another as a result of the relative change in price or in any other competitive factors.
3. If the sellers take their commercial decisions on basis of the shift of the buyers from the products to other products as a result to the relative change in prices or any other competitive factors.
4. The relative ease by which other persons can enter the market of the product.
5. The availability of the substitutive products before the consumer.

Secondly: Geographical area: It is the geographical area where the circumstances of competition are homogenous. In this regard, the potential probabilities of competition shall be taken into consideration and any of the following criteria:

1. The ability of the buyers to move between geographical areas as a result of the relative changes in prices or in other competitive factors.

2. Whether the buyers take their commercial decisions on basis of the movement of buyers between different geographical areas due to the relative changes in prices or in other competitive factors.
3. The relative ease that enables other persons to enter the relevant market.
4. The transportation costs between geographical areas, including the insurance costs and the required duration to provide the geographical area with the relevant product from other markets or geographical areas or from abroad.
5. The customs tariffs and the non-tariff barriers on both domestic and international levels.

Article 7: Dominance

The dominance of a person in a relevant market is achieved with the availability of the following elements:

1. The person has a market share exceeding 25% of the relevant market. The calculation of this share is based on the two elements of that market together, namely, the relevant products and the geographic area during a certain period of time.
2. The ability of a person to exercise an effective impact on the prices of the products or on the quantity supplied of them in the relevant market.
3. The inability of the person's competitors to limit his/her effective impact on the prices or on the quantity of the products supplied in the relevant market.

Article 8

The person shall have effective impact on the prices of the products or the quantity supplied in the relevant market if this person has the ability, through his/her individual acts, to determine the prices of these products or the quantity supplied in that market where his/her competitors do not have the ability to prevent these acts, taking into consideration the following factors:

- a) The person's share in the relevant market and his/her position in comparison to the remaining competitors.
- b) The conduct of the person in the relevant market in the previous period.
- c) The number of competing persons in the relevant market and its relative impact on the structure of that market.
- d) The ability of the person and his/her competitors to obtain the raw materials necessary for production.
- e) The existence of barriers facing other persons to enter the relevant market.

Article 9: Competing Persons

Competing Persons shall mean any of the persons who have the ability to carry out the same activity in the relevant market at the present time or in the future.

PART TWO AGREEMENTS AND CONTRACTS BETWEEN COMPETING PERSONS

Article 10

The agreements and contracts concluded between the Competing Persons in the Relevant Market include verbal and written agreements and contracts.

Article 11

Agreements or contracts between Competing Persons in any relevant market shall be prohibited if they are intended to cause any of the following:

- a) Increasing, decreasing or fixing prices of sale or purchase of products subject matter of dealings. Determination of price shall cover due returns on instalments, guarantee duration, after sale services and other contractual conditions that influence the purchasing or selling decision.
- b) Dividing product markets or allocating them on grounds of geographic areas, distribution centers, customer base, goods, market shares, seasons or time periods.
- c) Coordination with regard to proceeding or refraining from participating in tenders, auctions, bids and other calls for procurement. The indications that are taken into consideration for the existence of such coordination are, in particular, the following:
 - Submitting similar offers, which include the agreement on common rules for the calculation of prices or the determination of the offer conditions.
 - Agreeing on the person who will submit the offer, which includes the prior agreement on the person who will be awarded the tender either by alternation, or on geographical basis or on customer division basis.
 - Agreeing on the submission of fictitious offers.
 - Agreeing on preventing a person from submitting or participating in submitting offers.
- d) Restricting the manufacture, distribution or marketing, either for goods or services, including limiting of the product in terms of its kind or volume or restrictions for their availability.

PART THREE AGREEMENTS OR CONTRACTS BETWEEN A PERSON AND ANY OF ITS SUPPLIERS OR CLIENTS

Article 12

Agreements or contracts between a person and any of its suppliers or clients are prohibited if they are intended to restrict competition.

The evaluation of whether or not the agreement or contract between a person and any of its suppliers or clients would restrict competition is based on the inquiry made by the Authority on a case by case basis in light of the following factors:

1. The effect of the agreement or contract on the freedom of competition in the market.
2. The existence of benefits accrued to the consumer from the agreement or contract.
3. The considerations of preserving the quality of the product, its reputation, safety, and security requirements, in a manner that do not harm competition.
4. The extent of compliance of the conditions of the agreement or the contract with established commercial customs in the activity subject to examination.

PART FOUR

ABUSE OF DOMINANT POSITION IN A RELEVANT MARKET

Article 13

A Person holding a dominant position in a relevant market is prohibited from carrying out any of the following:

a) Undertaking an act leading to the non-manufacturing, non-production or non-distribution of a product, whether totally or partially, for a certain period or certain periods of time. Period or periods of time shall mean the period or periods of time that suffice to result in the prevention, restriction or harm of the freedom of competition.

b) Refraining from entry into sale or purchase transaction regarding a product with any Person or totally ceasing to deal with it in a manner that results in restricting that Person's freedom to access, continue, or exit the market at any time, which includes imposing financial conditions or obligations or abusive contractual conditions or conditions that are unusual in the activity subject matter of dealings.

Refraining from entry into transactions with any Person or totally ceasing to deal with it shall not be prohibited if justified on the basis that this Person does not have the ability to fulfil its obligations arising from the contract.

c) Any act that limits distribution of a specific product, on the basis of geographic areas, distribution centers, clients, seasons or periods of time among Persons with vertical relationships. Vertical relationship shall mean the relationship between the Dominant Person and any of its suppliers or between the Dominant Person and any of its clients.

d) Imposing as a condition, for the entry into a sale or purchase agreement of a product, the acceptance of obligations or products unrelated by their very nature or by commercial custom to the original transaction or agreement.

e) Discriminating between sellers or buyers having similar contractual positions in sale or purchase prices or in the terms of the transactions, in a manner that weakens their ability to compete with one another or leads to drive out some of them from the market.

f) Refraining, whether totally or partially, from producing or providing a product that is circumstantially scarce in the market when its production or provision is economically possible.

A circumstantially scarce product shall mean the product of which the available quantities do not fulfil except a small percentage of the demand size in the Relevant Market.

g) For the Person in a dominant position to dictate on Persons dealing with it not to allow the usage of their utilities or services to any of its competitors, despite this being economically possible.

These utilities and services shall include those which are privately owned by those dealing with the Person in a dominant position, and which are indispensable for the competing persons to enter or to remain in the market.

h) Selling products below their marginal cost or average variable cost.

Marginal Cost shall mean the share of one unit of a given product from the total costs within a certain period of time. The Variable Cost shall mean the cost which changes with the change in the volume of products provided by the Person during a certain period of time.

Average Variable Cost shall mean the total variable costs divided by the number of units of products.

For the determination of whether the product is sold below their marginal cost or the average variable cost the following elements shall be taken into consideration:

1. If the sale will drive out the Dominant Persons' competing persons from the market.
2. If the sale will prevent the Dominant Person's competing persons from entering the market.
3. If the Dominant Person will be able to increase prices after driving out its competing persons from the market.
4. If the period of time of the sale of a product below its marginal cost or its average variable cost will result into the occurrence of any of the aforementioned.

i) Imposing an obligation on a supplier not to deal with a competitor.

The non-dealing shall mean the refraining from dealing with a competing person, whether totally or reducing the size of dealing with him to the extent that would threaten its existence in the market or drive it out of the market or prevent or restrict the freedom of the potential competitors from entering the market.

PART FIVE

PUBLIC UTILITIES AND ESSENTIAL PRODUCTS

CHAPTER ONE

PUBLIC UTILITIES

Article 14

The provisions of the Law and these Regulations shall not apply to public utilities managed by the State. The decisions, agreements, contracts and works related to these public utilities managed by the State are not subject to any of the acts provided for in Articles 6, 7 and 8 of the Law.

Article 15

Any company subject to the provisions of the Private Law and managing a public utility, before concluding agreements, contracts or carrying out works related to the activity of this utility and is within the scope of the prohibitions set out in Articles 6, 7 and 8 of the Law, may request the Authority to exempt all these agreements, contracts or works or any of them from the prohibition where this is in the public interest or for attaining benefits to the consumers that exceed the effects of restricting the freedom of competition.

Article 16

The request referred to in Article 15 of these Regulations and the decision on it shall be in accordance with the following measures and procedures:

1. The request is to be presented in writing to the Chairperson of the Authority, prior to the conclusion of the agreement or the contract or prior to the carrying out of the works subject matter of the request, provided the request includes an extensive presentation of its reasons and a clarification of the public interest attained by the agreement, contract or works, or to the benefits to the consumer. Supporting evidence shall be annexed to the request.
2. The Chairperson presents the request to the Board to review it in its first upcoming meeting or in the meeting determined by the Chairperson when necessary.
3. The Board may refer the request to the competent department of the Authority to examine it and to prepare a report within the time limit determined by the Board and not exceeding thirty days. The Board may extend this period for additional thirty days upon the request of the Executive Director of the Authority.
4. The competent department may request additional information and data from the concerned parties or others and may hold hearings to which the submitter of the request is invited.
5. The competent department submits its report regarding the request to the Executive Director in order to present it to the Board in the first upcoming meeting after finalizing the report. The Board shall decide on the request within thirty days from the date it was presented in.
6. The decision of the Board accepting the exemption from the prohibition shall be based on the attainment of public interest or benefits to the consumers that exceed the effects of restricting the freedom of competition, otherwise the request shall be

rejected. The decision of acceptance may include an obligation on the requestor to carry out a certain act or to refrain from carrying out a certain act.

7. The Executive Director shall be responsible for delivering the decision of the Board to the requestor by registered mail, to be signed upon receipt. A decision of refusal shall be justified.

Article 17

The exemption granted by the Authority is valid for two years, and may be renewed upon the request of the concerned parties sixty days prior to the end of the exemption period. The Authority reviews the renewal request in accordance with the same provisions and procedures set out by Article 16 of these Regulations.

CHAPTER TWO ESSENTIAL PRODUCTS

Article 18

The Council of Ministers may, after taking the opinion of the Authority, issue a decree determining the selling price for one essential product or more for a specific period of time.

Article 19

The Authority carries out the necessary studies for the Council of Ministers Cabinet to perform its competence set out in Article 10 of the Law regarding the determination of the selling prices of the essential products and prepares the reports on the opinion of the Authority on this matter.

Article 20

Any agreement concluded by the government for the purposes of the implementation of the selling prices of the essential products determined according to Article 10 of the Law shall not be considered an anti-competitive practice.

PART SIX THE AUTHORITY FOR THE PROTECTION OF COMPETITION AND THE PROHIBITION OF MONOPOLISTIC PRACTICES

CHAPTER ONE BOARD MEETINGS AND ITS WORK FLOW

Article 21

The management of the Authority shall be carried by a Board of Directors composed of a Chairperson and fourteen members and formed as set out in Article 12 of the Law. The Board shall have a Secretariat of which the formation and work flow shall be issued by virtue of a decision of the Board.

Article 22

The Board shall convene upon an invitation of its Chairperson at least once every month and whenever the necessity so requires. Invitations to the meeting are to be sent, in writing, at least four days prior to the date of the meeting. The agenda of the meeting shall be attached to the invitation.

The meetings of the Board shall be valid with a quorum of at least ten members, and the resolutions shall be passed by a majority vote of its members.

Article 23

No Board member shall participate in the deliberations or voting concerning a case presented to the Board, if he/she has a direct or indirect interest in it, or if he/she is a relative to any of the parties up to the fourth degree, or if such member currently represents or has represented any of the parties. The Board member is committed to disclose in writing any of the previously mentioned reasons before the beginning of the hearings or voting regarding the presented case.

Article 24

The Board may invite to its meetings specialists of whom it wishes to seek assistance. Such specialists shall not have voting rights.

Article 25

The minutes of the Board meetings shall be regularly documented in a special register, after each meeting and shall be signed by the Chairperson and the Secretary of the meeting.

CHAPTER TWO COMPETENCES OF THE BOARD

Article 26

The Board shall be competent of the following:

- a) Giving its opinion to the Ministers' Cabinet to determine the selling price of one or more essential products for a specific period of time pursuant to Article 10 of the Law.
- b) Accepting grants, donations and any other resources are granted to the Authority and which do not contradict with its goals.
- c) Issuing the regulations concerning the organization of the work in the Authority and concerning the financial and administrative rules pertaining to its, without being restricted by the rules and regulations applicable to State Civil Employees, and referring it to the Competent Minister for issuance.
- d) Recommending the names of the employees of the Authority who are shall be granted the status of law enforcement officers in applying the provisions of the Law, who shall be specified by virtue of a decree issued by the Minister of Justice in agreement with the Competent Minister.

- e) Approving the annual report regarding the activities, future plans and recommendations of the Authority.
- f) Giving its opinion on draft laws and regulations relating to the regulation of competition.

The aforementioned competences are in addition to other competences provided for under the Law and in the other articles of these Regulations.

Article 27

The Board may assign one of its members or a committee formed among them to carry out a specific assignment or to supervise any of the aspects of the activities of the Authority, and subsequently to prepare reports on the assignment or the supervision performed to be presented to the Board.

Article 28

The Chairperson shall be competent of the following:

- a) Coordinate with competition authorities in other countries on matters of common interest, and to present the respective reports to the Board.
- b) Preparing an annual report on the activities of the Authority and its future plans and recommendations and presenting it to the Board for its approval.
- c) Nominating the Executive Director of the Authority and send this selection to the Competent Minister.
- d) Supervising the organization of training and educational programs related to the awareness about the provisions of the Law and free market principles in general.
- e) Supervising the issuance of the periodic reports which include the decisions, recommendations, procedures and measures taken by the Authority and other matters relating to the Authority.

CHAPTER THREE FEES

Article 29

The exemption request provided under Article 9 of the Law and the request of renewal of this exemption shall be subject to a fee of ten thousands 10,000 LE payable at the time of the submission of the request to which the receipt evidencing payment shall be attached.

Article 30

The request of review or that of issuing a certificate or an official copy of one of the documents that the Authority is allowed to circulate shall be subject to a fee of one hundred 100 LE.

PART SEVEN
FILING COMPLAINTS AND THE PROCEDURES OF
INQUIRY, INSPECTION, COLLECTION OF INFORMATION
AND RECEIVING NOTIFICATIONS

CHAPTER ONE
FILING COMPLAINTS

Article 31

Any person may report to the Authority any breach of the provisions of the Law. The Authority shall not collect any fees for receiving the above complaints or for their examination.

Article 32

The complaint shall be filed with the Authority in writing and shall be accompanied with the following data and documents:

1. The name of the complainant and his/her address, profession, capacity and his/her interest in filing the complaint and the supporting documents.
2. The name of the complained against, his/her address and the nature of his/her activity.
3. The kind of breach.
4. The supporting evidence on which the complaint is based and related documents if available.
5. The indication of the damage incurred by the complainant if available.

The Authority may not review any complaint that does not fulfil the aforementioned data and documents.

CHAPTER TWO
PROCEDURES OF INQUIRIES, INSPECTION
AND COLLECTION OF INFORMATION

Article 33

The Authority shall handle all complaints filed, and it may, without the need of receiving a complaint, initiate the procedures of inquiry, inspection and collection of information and issue orders to initiate such actions in the cases of anticompetitive agreements and practices.

Article 34

The procedures of inquiry, inspection and collecting of information regarding the cases of anticompetitive agreements and practices or other breaches of the provisions of the Law shall be carried out in accordance with the following articles.

Article 35

The complaint shall be registered upon its filing in a specially held record, and the complainant shall be given a receipt with the number and the date of registration of the report.

Cases in which the Authority carries out the inquiry, inspection and collection of information on its own or cases in which the Authority issues orders to initiate such actions shall be registered in another specially held record.

Any procedures carried out regarding any of the registered cases as well as any decisions or rulings issued in this respect shall be regularly recorded in both aforementioned records.

Article 36

Complaints shall be presented to the Executive Director to ensure their fulfilment of the data and documents provided under Article 32 of these Regulations, and to refer the complying complaints to the competent department and to notify the Chairperson of this referral.

Article 37

The competent department in the Authority will carry out the procedures of inquiry, inspection and collection of information regarding complaints it was referred by the Executive Director within a period not exceeding ninety days from the date of referral. Minutes, encompassing all procedures carried out, shall be prepared.

The Executive Director assigns the competent department to carry out the aforementioned procedures in the cases in which the Chairperson so decides.

Article 38

Employees who are granted the status of law enforcement officers shall be entitled to carry out the following procedures after disclosing their identity and presenting it to the concerned party:

1. Reviewing records and documents, as well as obtaining any information or data from any governmental or non-governmental authority for the purpose of handling cases submitted to the Authority.
2. Entering, during official working hours, work places or headquarters of Persons subject to examination upon obtaining a written permission from the Executive Director, and they can call for the assistance of the Public Authority personnel the need arises.

3. Carrying out the necessary procedures of collecting information necessary for examination and interrogating any person regarding his committing of any breach of the provisions of the Law.

Article 39

The competent department shall, subsequent to the accomplishment of the procedures of inquiry, inspection and collection of information, prepare an opinion to be presented to the Executive Director of the Authority. The Executive Director presents the above opinion to the Board accompanied by his/her own opinion, in its first upcoming meeting after receiving the opinion.

Article 40

The Board may, after reviewing the report on the case at hand, issue a justified decision to terminate the matter or to carry out further inquiry, inspection and collection of information by the competent department in the Authority.

Article 41

Upon establishing a breach of any of the provisions of Articles 6, 7 and 8, the Authority shall order the person in breach to remedy the situation and eliminate such breach immediately or within a given period of time specified by the Board.

The Executive Director shall notify the person in breach of the remedy order by means of registered mail, to be signed upon receipt.

The Board may issue a decision to stop the prohibited practice immediately or after the lapse of the said period without remedying the situation or eliminating the breach.

Article 42

Without prejudice to the provisions of Article 40 of these Regulations, the Board may refer the report regarding the case at hand to the Competent Minister or any person delegated by him to carry out the procedures of filing the criminal lawsuit.

Article 43

The Executive Director shall notify the concerned person or persons of the decision taken by the Board regarding the complaint or the case at hand by means of registered mail, to be signed upon receipt.

CHAPTER THREE RECEIVING NOTIFICATIONS

Article 44

The Authority shall receive notifications of acquisition of any assets, propriety rights, usufruct, shares, setting up of unions, mergers or amalgamations or joint management of two or more Persons. The notification shall be submitted within 30 days as of the date of effectiveness of the

notified legal action as long as the annual turnover of the last balance sheet of the concerned persons exceeded one hundred million Egyptian pounds.

Article 44(bis)

Any person who acquires assets, propriety rights, usufruct, shares, setting up of unions, mergers or amalgamations or joint management of two or more Persons, shall submit notification to the Authority in accordance with the requirements stipulated in article 44 hereof. In case that several persons undergo through merger, the emerging person shall submit the notification.

Article 45

Notification shall be presented to the Authority in writing and must include the following data:

1. The name of the notifying person and other concerned persons, their nationalities, administration centers and the headquarters of their activities.
2. The notified legal disposition, its date and the legal position arising from it.
3. The licenses and approvals obtained.
4. The annual turnover according to the last approved balance sheet and clarifications thereof.

All references supporting the aforementioned data shall be attached to the notification.